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Supreme
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FIRST AFFILIATED SECURITIES, INC.,
a California corporation, et al.,
Petitioners,

vs.

MARY LOU SULLIVAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Can a defendant's right under *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981), to remove a state court action arising from the same operative facts as a contemporaneously filed federal action be defeated unless there exists a ripe federal res judicata defense?

LIST OF PARTIES AND RULE 28.1 STATEMENT

Each party to the appeal to the Ninth Circuit Court of Appeals is a petitioner or respondent in this proceeding.

Respondents (plaintiffs and appellants below) are: Mary Lou Sullivan, Daniel T. Sullivan, William T. Sullivan, Jr., Kenneth C. Martin, Perry Kenny, Calvin F. Robinson, Catherine D. Robinson, Sydney Krogstad, Beverly Krogstad, Joseph S. Wand, Robert S. Mesires, William E. Coyle, Diane H. Coyle, Dan Boyd, Roxana Boyd, Thomas D. Adamson, Mark Adamson, Thomas C. Miller, Brian J. Miller, Robert E. Richardson, Raymond D. Sussman, Anjali Sussman, and Cerena Wong, all individuals; Malm Metal Products, Inc., a California corporation, Malm Metal Products, Inc. Defined Benefit Plan, Pine Creek Development Corporation Pension Plan and Trust, Pine Creek Properties, a California limited partnership, Robert E. Richardson, M.D., P.C., Defined Benefit Pension Plan and Trust, Joseph S. Wand, M.D., Inc. Pension and Profit Sharing Plan, and Able Fence Co., Inc., a California corporation.

Petitioners (defendants and appellees below) are: First Affiliated Securities, Inc., a California corporation, Larry Gibson, Harold E. Card, Raymond Jallow, Ira W. Palmer, William H. Palmer, and Tim D. Compton, Thomas Tierney, Tierney & Ernst, Carl E. Wright, Wright Herfordt & Sanders, Peat Marwick Main & Co. (formerly Peat, Marwick, Mitchell & Co.), Paul J. Keil and Financial Communications Group.

First Affiliated Securities, Inc. is a wholly owned subsidiary of Bekhor International Group, Inc. (U.S.A.) which, in turn, is a wholly owned subsidiary of A.G. Bekhor, Ltd. (England).

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No. _____

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FIRST AFFILIATED SECURITIES, INC.,
a California corporation, et al.,
Petitioners,

vs.

MARY LOU SULLIVAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 1, 1987, which held that removal, under the artful pleading doctrine, of a state court action arising from the identical facts as a contemporaneously filed federal action depends on the existence of a ripe res judicata defense.

OPINIONS BELOW

The decision of the Court of Appeals is officially reported at 813 F.2d 1368 and is reproduced in Appendix I. The decision of the District Court is unreported. It is reproduced in Appendix II.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1987. A timely petition for rehearing and suggestion for rehearing en banc was denied on June 10, 1987. A timely motion to stay the mandate to permit the filing of this petition was granted. This petition is filed within 90 days of the denial of rehearing, and within the time required by the order staying the mandate. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The principal statutes involved are 28 U.S.C. §§ 1331 and 1441(a) and (b).

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

This case questions whether plaintiffs may affirmatively invoke federal jurisdiction by filing an action asserting federal claims in federal court, and at the same time defeat the defendants' statutory right pursuant to 28 U.S.C. §§ 1441(a) and (b) to remove to federal court plaintiffs' contemporaneously filed state action arising out of the same nucleus of operative facts but artfully drawn to rely only on state law.

Petitioners ("defendants") timely removed this action, which respondents ("plaintiffs") filed in California state court, to the United States District Court for the Northern District of California. Plaintiffs had filed a parallel federal action there against the same defendants, based on the identical facts.[1] Defendants moved to transfer both the federal action and this action to the United States District Court for the Western District of Missouri.[2] A number of actions were pending in that district involving the same defendants and arising from the same facts, including a class action as to which plaintiffs were then putative class members.[3] At the same time, plaintiffs moved to remand this action to state court on the ground that no federal question was presented.[4]

The District Court denied plaintiffs' motion to remand and transferred both plaintiffs' actions to Missouri.[5] It found that, in filing their federal claims, plaintiffs had "evidenced their intention to utilize affirmatively the processes of the federal courts to redress the identical claimed injury alleged" in this action, and that plaintiffs' "contemporaneous filing of their Federal Action precludes them from defeating removal by the 'artful pleading' of the same operative facts as state law claims."[6] The District Court's ruling was based upon the branch of the artful

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[1] *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1370-71 (9th Cir. 1987), Appendix I at A-4, A-6; Order Denying Plaintiffs' Motion to Remand and Granting Defendants' Motions to Transfer Venue of Related Actions ("Order Denying Remand"), Appendix II at A-20.

[2] 813 F.2d at 1370-71, Appendix I at A-6.

[3] *Id.* at 1370 and n.2, Appendix I at A-5.

[4] *Id.* at 1371, Appendix I at A-6.

[5] Order Denying Remand, Appendix II at A-22.

[6] *Id.* at A-20, A-21.

pleading doctrine applied in this Court's decision in *Federated Department Stores v. Moitie,* 452 U.S. 394 (1981), and in the decision in *Salveson v. Western States Bankcard Ass'n,* 525 F. Supp. 566 (N.D. Cal 1981), *aff'd in relevant part,* 731 F.2d 1423 (9th Cir. 1984).[7]

The District Court thereafter denied plaintiffs' motion for reconsideration. However, it certified its order denying the motion to remand for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed transfer of this action to permit plaintiffs to petition for leave to appeal.[8] The Court of Appeals granted leave to appeal and subsequently reversed. It held that removal under the *Moitie* branch of the artful pleading doctrine can only be based on a res judicata defense.[9] No res judicata defense has ripened in this action, since judgment has not yet been entered in plaintiffs' federal action.

REASONS FOR GRANTING THE WRIT

The non-preemption branch of the artful pleading doctrine that the Court addressed in *Moitie* is an area of law in need of this Court's authoritative voice. The doctrine involves an important issue of federal law — interpretation of an Act of Congress defining the jurisdiction of the federal courts. There is sharp disagreement between the opinion in this case and existing decisions of this Court and of the Fifth and Second Circuits. This case squarely frames the issue, and a decision by this Court will give guidance to the lower courts in this fundamental area of federal law.

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[7] *Id.* at A-20, A-21.

[8] 813 F.2d at 1371, Appendix I at A-6.

[9] 813 F.2d at 1376, Appendix I at A-15—A-17.

I.

THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUIT COURTS.

A. The Court of Appeals' Decision Conflicts With This Court's Decision In *Federated Department Stores v. Moitie.*

The decision of the Court of Appeals conflicts with this Court's decision in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981).[10] In *Moitie*, this Court applied the "artful pleading" doctrine to uphold removal of a state court action based on a parallel federal action arising from the same nucleus of operative facts. In that case, after plaintiffs lost a federal antitrust action, two of the plaintiffs did not appeal. Instead, they filed a state court action based on identical facts but purporting to raise only state law claims. Defendants removed the action on the basis of federal question jurisdiction. The district court refused to remand and dismissed the action on the ground that the prior federal action was res judicata. The Court of Appeals affirmed the denial of remand but reversed the dismissal, creating a public policy exception to the doctrine of res judicata.

On writ of certiorari, this Court upheld removal but reversed the Court of Appeals' decision on res judicata. As to removal, the Court stated:

> As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." . . . The District Court applied that settled principle to the facts of this case. . . . [I]t found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state-law claims. We will not question here that factual finding.[11]

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[10] As discussed in Part II below, the decision also conflicts with decisions of this Court and the other lower federal courts espousing the rule that removal may not be based on a federal defense.

[11] 452 U.S. at 397 n.2.

The Court of Appeals in the instant action examined two possible rationales for removal on the basis of the *Moitie* branch of the artful pleading doctrine. The "election" rationale depends on a plaintiff's decision to assert federal claims and invoke federal jurisdiction over those claims. Where plaintiffs have elected to utilize the processes of the federal courts to vindicate their rights, defendants may remove a parallel state action involving substantially similar claims by the same plaintiffs against the same defendants. The "res judicata" rationale permits removal only on the basis of a res judicata defense to the parallel state action arising from a prior federal judgment. In its decision in this case, the Court of Appeals expressly rejected the "election" rationale and adopted the "res judicata" rationale.[12]

The Court of Appeals' opinion stated, as to this Court's decision in *Moitie:* " The Supreme Court dedicated most of its opinion to res judicata, giving cursory treatment to removal. *Moitie* can thus be construed as permitting removal only of state claims filed to circumvent the res judicata impact of a federal judgment."[13] This construction of *Moitie* is misconceived.

This Court *did* devote most of its decision to res judicata — the primary issue before the Court. But the Court gave no indication of a link between its decision on res judicata and its decision on the artful pleading doctrine upholding removal. Its res judicata analysis dealt only with whether the Court of Appeals erred in creating a public policy exception to the res judicata doctrine; it did not discuss removal.

In connection with removal, on the other hand, *the Court never so much as mentioned res judicata.* Instead, it found that "at least some of the claims had a sufficient federal character to support removal."[14]

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[12] 813 F.2d at 1373, Appendix I at A-11. The Court of Appeals rejected the "election" rationale, even though it recognized that adoption of that rationale would serve a number of purposes. "Requiring plaintiffs to submit to this election would avoid splitting of claims arising from the same facts, simplify mass litigation, save judicial resources, and balance the plaintiffs' choice of forum against the defendants' interest in avoiding multiple litigation." *Id.* at 1374, Appendix I at A-12.

[13] *Id.* at 1376, Appendix I at A-15.

[14] 452 U.S. at 397 n.2.

The Court never implied that removal was proper *because* of the existence of a res judicata defense, as the Court of Appeals held here. Justice Brennan's dissent, arguing that removal was not proper because the removed case articulated only state-law claims[15], clearly invited such a response if that was what the majority intended. The majority opinion, however, nowhere stated that the existence of a res judicata defense provides the requisite federal character to support removal.

B. The Court of Appeals' Decision Conflicts With Decisions Of The Second and Fifth Circuits.

A further reason for granting the writ is that the Court of Appeals' opinion directly conflicts with existing decisions of other federal circuit courts on an important question of federal law, going to the heart of federal jurisdiction. Two other circuits applying the *Moitie* branch of the artful pleading doctrine have construed it as embodying the election rationale that the Ninth Circuit rejected, not the res judicata doctrine that the Ninth Circuit adopted.

Rule 17 of the Supreme Court Rules provides that one consideration governing review on certiorari is: "When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . . ." Because the Court of Appeals' decision conflicts with decisions of the Second and Fifth Circuits, the writ should be granted.

1. ***Travelers Indemnity Co. v. Sarkisian***

In *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.), *cert. denied*, 107 S.Ct. 277 (1986), the Second Circuit expressly rejected federal res judicata as a basis for removal under the *Moitie* branch of the artful pleading doctrine and instead applied the "election" rationale.[16] The *Travelers* court

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[15] *Id.* at 409-10.

[16] In *Travelers*, plaintiff filed in federal court an action under the Racketeer Influenced & Corrupt Organizations Act ("RICO"), which action was dismissed on the authority of a case later reversed by the Supreme Court. The court of appeals affirmed the dismissal prior to the change in the law. Plaintiff did not petition for writ of *certiorari*. Plaintiff had also commenced an action in state court alleging state court theories of fraudulent conveyance, piercing the corporate veil and unlawful payment of dividends and salary. Defendants removed on the theory that the state court claims were "artfully pled" RICO claims.

thoughtfully analyzed and rejected the "res judicata" rationale the Court of Appeal adopted here:

> *Salveson* also suggested, as an additional rationale for removal in *Federated Stores,* that "the effect of permitting Brown to prosecute the same claims under state law in the second action would have been to impair the ability of defendants to assert the federal *res judicata* defense against those claims." *Salveson v. Western States Bankcard Association,* [525 F.Supp. 566, 575 (N.D. Cal. 1981)]. However, if Brown's case had been remanded to state court, the *res judicata* effect of the prior federal question suit would still have been governed by federal law.
>
> * * *
>
> [T]o hold that a plaintiff's state law claim will be recharacterized as a federal claim whenever it arises out of the same transaction as a prior federal claim would lead to the anomalous result that a case is removable under *Federated Stores* only if the defendant has a successful *res judicata* defense under federal law. This approach would seem to violate the well-established rule that removal jurisdiction may not rest on a federal defense.[17]

The Second Circuit Court of Appeals derived two requirements for finding that a federal claim is removeable under *Moitie* as "artfully pled": (1) the elements of the claim must be substantially identical to those of a claim expressly grounded on federal law; and (2) plaintiff must have "previously elected to proceed in federal court."[18] The *Travelers* court ultimately found that removal in that case was improper because the elements of the state law claims were not substantially identical to the previously pled RICO claims.[19]

The Court of Appeals in this case flatly rejected the *Travelers* decision:

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[17] 794 F.2d at 761 n.8. and n.10

[18] *Id.* at 760.

[19] Petitioners here meet both requirements set by the *Travelers* court. The state and federal securities laws claims asserted by plaintiffs in their parallel actions are substantially identical. And, prior to removal, plaintiff elected to proceed in federal court.

> [A]ttempts to place limits on the scope of the election rationale have been unsatisfactory. The Second Circuit allows removal based on a plaintiff's election only if he filed substantially similar state and federal claims, and filed the federal claim in federal court first. *Travelers*, 794 F.2d at 760-61. . . . The requirement of substantial similarity of claims seems unsound. . . . Also, the order of filing should make no difference. Regardless of the filing order, the plaintiff will have elected to use the federal forum and to split his claims.[20]

2. *Powers* v. *South Central United Food & Commercial Workers Unions.*

The Second Circuit is not the only other federal circuit with which the opinion in this case is in conflict.[21] The Court of Appeals' decision is also inconsistent in reasoning and principle with that of the Fifth Circuit Court of Appeals in *Powers v. South Central United Food & Commercial Workers Unions,* 719

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[20] 813 F.2d at 1375, Appendix I at A-14.

[21] The unsettled nature of the law in this area is not only exemplified by the split among the federal circuit courts, but by the split within the Ninth Circuit itself. The Court of Appeals' decision is in conflict with two earlier Ninth Circuit decisions, *Moitie v. Federated Department Stores*, 611 F.2d 1267 (9th Cir. 1980) and *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984), *aff'g in relevant part*, 525 F.Supp. 566 (N.D. Cal. 1981). In *Moitie*, the Ninth Circuit squarely held that the action had been properly removed under the artful pleading doctrine while at the same time holding that res judicata did *not* apply to bar plaintiffs' claims. Therefore, federal res judicata could not possibly have been any part of the court's rationale for applying the artful pleading doctrine in that decision. On writ of certiorari, this Court did not disturb that part of the Court of Appeals' ruling, although it reversed the res judicata holding.

In *Salveson v. Western States Bankcard Ass'n*, the Court of Appeals held that the federal nature of plaintiff's claim may derive from the plaintiff's election to pursue in federal court claims based upon the same nucleus of operative facts as his state court claims — the "election" rationale:

> Critical in *both* res judicata and artful pleading considerations was the fact that appellant Brown had previously filed the claims as federal claims in federal court. . . .
>
> We agree that the conclusion of artful pleading is properly drawn when the plaintiff "by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one."

Id. at 1429 (footnote and citation omitted; emphasis added). Thus *Salveson* expressly adopted, not the federal "res judicata" rationale, but the very "election" rationale which the Court of Appeals rejected in this decision.

F.2d 760 (5th Cir. 1983).[22] The Fifth Circuit, like the Second Circuit, applied the "election" rationale in determining whether the state action artfully pled federal claims.[23] The Court of Appeals in this case expressly acknowledged its disagreement with *Powers:*

> The Fifth Circuit [in *Powers*] held that removal was improper because, in contrast to *Moitie,* the plaintiff had "not evidenced a desire to proceed under federal law; rather, she has consistently and vociferously attempted to avail herself of the state forum," *id.* at 766, and she filed the federal suit after the state suit as a tactical maneuver to protect against the running of the statute of limitations, *id.* at 766 n. 5. The Fifth Circuit's distinctions are not persuasive. The amount of effort plaintiff expended in the state forum, and her motives for filing the federal action, whether tactical or not, are irrelevant if removal is justified by the election to pursue the federal action.[24]

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[22] Not only did the Court of Appeals flatly reject the decisions of the Second Circuit and the Fifth Circuit, it also rejected, *sub silentio,* the District Court decision in *Reid v. Walsh,* 620 F. Supp. 930 (M.D. La. 1985), a case squarely on point with this one.

[23] *Id.* at 766 and n.5. The plaintiff in *Powers* initially filed a state action seeking relief exclusively under state law. Defendants removed the action based on the branch of the artful pleading doctrine involving federal preemption of state law remedies. *After* removal, plaintiff filed a parallel federal action. Her purpose in filing the federal action was to protect against the expiration of the statute of limitations on the federal claims defendants contended were plaintiff's sole remedy and which plaintiff wished to assert in the event the court determined she had no state remedy and denied remand. In ordering the remand in *Powers,* the Court of Appeals stressed that plaintiff's invocation of federal jurisdiction after removal was purely defensive.

[24] 813 F.2d at 1375, Appendix I at A-14, A-15. Since the *Powers* plaintiff *never* elected to proceed in federal court prior to the removal of her state action, that later-filed action could never support removal. The crucial time in determining the propriety of removal is the time of removal. *Pullman Co. v. Jenkins,* 305 U.S. 534, 537-38 (1939); *In re Carter,* 618 F.2d 1093 (5th Cir. 1980), *cert. denied* 450 U.S. 949 (1981); *Westmoreland Hosp. Ass'n v. Blue Cross,* 605 F.2d 119, 123 (3d Cir. 1979), *cert. denied,* 444 U.S. 1077 (1980).

II.

THE COURT OF APPEALS' DECISION MAKING REMOVABILITY DEPEND ON A FEDERAL DEFENSE IS A CLEARLY ERRONEOUS APPLICATION OF THE REMOVAL STATUTE.

The decision of the Court of Appeals not only conflicts with decisions of this Court and of the lower federal courts, but it erroneously makes removal of an action under the artful pleading doctrine applied in *Moitie* depend exclusively on the existence of a federal defense. It thereby both conflicts with numerous decisions of this Court and makes *Moitie* removal purposeless.

A. The Decision Improperly Grounds Removal Upon A Federal Defense

The Court of Appeals' ruling that the right to remove a state court action that parallels a federal action depends on the existence of a ripe res judicata defense, creates a unique and inappropriate exception to perhaps the most firmly established rule of removal law. As this Court recently reiterated:

> [I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.[25]

The Court of Appeals' decision in this case, holding that removal would be proper only if there existed a federal res judicata defense to plaintiffs' state action, is absolutely irreconcilable with that principle.

The Court of Appeals acknowledged that its holding created an exception to the principle that a federal defense cannot support removal. It attempted to rationalize this radical departure from existing law by arguing that the preemption

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[25] *Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804, 4805 (June 9, 1987) (emphasis in original). *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10-12 and n.9 (1983).

branch of the artful pleading doctrine is also, in effect, removal based on the existence of a federal defense. This is wrong. In cases removable on that rationale, *plaintiff* is necessarily relying upon federal law, because "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."[26] Thus, even though defendant, too, may rely on federal law—a defense based on federal law preemption—removal is *not* based on that ground but rather on the ground that plaintiff's claim is necessarily a federal one.

> Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a particular area, that *any civil complaint raising this select group of claims is necessarily federal in character.*[27]

B. The Decision Renders *Moitie* Removal Purposeless

Moreover, in holding that res judicata by reason of a prior federal adjudication constitutes the sole basis for removal under the artful pleading doctrine of *Moitie,* the Ninth Circuit has stripped the doctrine of all purpose. State courts must honor and apply res judicata arising from a federal judgment.[28] There is no need for removal to enforce such a judgment.

Even were a state court to refuse to honor the res judicata effect of a federal judgment, there is no point to removal in light of the injunction remedy available when federal res judicata provides a defense to a state action. A district court has the power to enjoin state court proceedings based upon a prior federal adjudication. Title 28 U.S.C. section 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by

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[26] *Caterpillar Inc. v. Williams,* 55 U.S.L.W. at 4806. *See Metropolitan Life Ins. Co. v. Taylor,* 55 U.S.L.W. 4468, 4469 (April 6, 1987).

[27] *Id.* at 4469 (emphasis added).

[28] *See Federated Dep't. Stores v. Moitie,* 452 U.S. at 398; *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948).

Act of Congress, or where necessary in aid of its jurisdiction, . . . *or to protect or effectuate its judgments.*" (Emphasis added.) The "relitigation" exception to the Anti-Injunction Act

> allows federal courts to enjoin state court proceedings to protect the res judicata effect of their judgments. *Midkiff v. Tom,* 725 F.2d 502, 504 (9th Cir. 1984). "Such an injunction is appropriate where a federal litigant has prevailed on the merits, yet is threatened with burdensome and repetitious relitigation of the same issues in a multiplicity of actions." *Id.*[29]

Because federal courts can enjoin state court proceedings to give effect to federal res judicata, interpreting *Moitie* and *Salveson* as the Court of Appeals has done renders those cases meaningless.[30]

The Court of Appeals' decision is a clearly erroneous application of the removal statute. If permitted to stand, the decision will support, as a general proposition, the consideration by other federal courts of federal defenses in a removal analysis. At the same time, the decision has vitiated the nonpreemption branch of the "artful pleading" doctrine, by permitting removal only when an injunction of the state court action would otherwise be permitted.[31] The petition should be granted to correct the Court of Appeals' clear error in interpreting removal law.

III.

CONCLUSION

The decision of the Court of Appeals is a plainly erroneous application of the relevant provisions of the removal statute; it involves an important issue of federal law; it is in direct conflict

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[29] *Golden v. Pacific Maritime Ass'n,* 786 F.2d 1425, 1427 (9th Cir. 1986).

[30] *See* 28 U.S.C. § 2283.

[31] Further, under the Court of Appeals' decision in this case, if plaintiffs' federal action reaches judgment first, as appears likely, defendants may *then* remove this action on the basis of the artful pleading doctrine, and seek dismissal on the basis of res judicata. It makes no sense to define the federal nature of claims based entirely upon the respective procedural status of the parallel state and federal actions.

with decisions on the non-preemption branch of the artful pleading doctrine of other federal circuit courts; it is inconsistent with this Court's decision in *Federated Department Stores v. Moitie;* and it conflicts in reason and principle with the numerous decisions of this Court and the lower federal courts establishing that removability may not be determined on the basis of a federal defense. For all of these reasons, the decision should be reviewed and corrected by this Court.

DATED: July 16, 1987

Respectfully submitted,

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July 16, 1987

APPENDIX I
[813 F.2d 1368]

Mary Lou SULLIVAN, Daniel T. Sullivan, William T. Sullivan, Jr., Kenneth C. Martin, Perry Kenny, Calvin F. Robinson, Catherine D. Robinson, Sydney Krogstad, Beverly Krogstad, Joseph S. Wand, Robert G. Mesires, William E. Coyle, Diane H. Coyle, Dan Boyd, Roxana Boyd, Thomas D. Adamson, Mark Adamson, Thomas C. Miller, Brian J. Miller, Robert E. Richardson, Raymond D. Sussman, Anjali Sussman, and Cerena Wong, all individuals; Malm Metal Products, Inc., a California corporation, Malm Metal Products, Inc. Defined Benefit Plan, Pine Creek Development Corporation Pension Plan and Trust, Pine Creek Properties, a California limited partnership, Robert E. Richardson, M.D., P.C., Defined Benefit Pension Plan and Trust, Joseph S. Wand, M.D., Inc., Pension and Profit Sharing Plan and Able Fence Co., Inc., a California corporation, Plaintiffs-Appellants,

v.

FIRST AFFILIATED SECURITIES, INC., a California corporation, Larry Gibson, Harold E. Card, Ronald R. Walker, Carl E. Wright, Wright Herfordt & Sanders, Raymond Jallow, Thomas Tierney, Tierney & Ernst, Ira W. Palmer, William H. Palmer, John P. Redd, Tim D. Compton, Paul J. Keil, Financial Communications Group, Ltd., Peat, Marwick, Mitchell & Co., Process Management Co., Inc. and Does One through Twenty, Doe Corporations Twenty-One through Forty, and Doe Partnerships Forty-One through Sixty, Defendants-Appellees.

No. 85-2961.

**United States Court of Appeals,
Ninth Circuit.**

Argued and Submitted Feb. 11, 1987.

Decided April 1, 1987.

As Amended April 20, 1987.

Two parallel securities actions were filed, one in federal court under federal law, and one in state court under state law.

State claims were removed to federal court. The United States District Court for the Northern District of California, John P. Vukasin, Jr., J., denied remand, based upon its analysis of "artful pleading" doctrine. On plaintiffs' interlocutory appeal, Court of Appeals, Wiggins, Circuit Judge, held that exception where state claims are filed to circumvent res judicata impact of federal judgment did not apply; because investors' claims were framed under state law, were not barred by res judicata nor preempted by federal law, and would only have been within district court's original jurisdiction had they been joined with federal claims, claims should not have been removed.

Denial of motion to remand reversed.

1. Removal of Cases 107(9)

Generally, denial of motion to remand action removed from state to federal court under artful pleading doctrine is question of federal subject matter jurisdiction which Court of Appeals reviews de novo.

2. Removal of Cases 107(7)

Burden of establishing federal subject matter jurisdiction falls on party seeking removal.

3. Removal of Cases 11

Suit may be removed to federal court under original jurisdiction removal statute only if it could have been brought there originally. 28 U.S.C.A. § 1441(a).

4. Removal of Cases 25(1)

Case "arises under" federal law only if federal question appears on face of plaintiff's well-pleaded complaint; original jurisdiction is lacking even if defense is alleged to be based exclusively on federal law so that defendant cannot obtain removal jurisdiction merely by asserting federal defense. 28 U.S.C.A. § 1331.

5. Removal of Cases 25(1)

Plaintiff is "master" to decide what law he will rely upon, and if he can maintain his claim on both state and federal

grounds, he may ignore federal question and assert only state law claim and defeat removal. 28 U.S.C.A. §§ 1331, 1441.

6. Removal of Cases 25(1)

"Artful pleading" doctrine is narrow exception to straightforward rules of removal jurisdiction which will be applied only if particular conduct complained of is governed exclusively by federal law; further, doctrine is invoked only in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results.

7. Removal of Cases 25(1)

Traditional example of artful pleading doctrine is one in which defendant had federal preemption defense to state claim and federal law provides remedy, in which case defendant can remove proported state claim; however, if state law is preempted by federal law and federal law provides no remedy, state law claim cannot be recharacterized as federal, as no federal claim exists, preemption is interposed solely as defense, and removal is improper. 28 U.S. C.A. §§ 1331, 1441(a, b).

8. States 18.77

Although federal courts have exclusive jursidiction over claims under 1934 Securities Exchange Act, federal securities laws do not preempt state securities laws that regulate intrastate offerings of securities and affect interstate commerce only incidentally. Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.

9. Federal Courts 31

Parties cannot by consent, waiver or estoppel obtain federal subject matter jurisdiction.

10. States 18.1

Res judicata impact of federal judgment is question of federal law which state court is bound to apply under supremacy clause. U.S.C.A. Const. Art. 6, cl. 2.

11. Removal of Cases 102

The "artful pleading" doctrine, as articulated in *Moitie*, was not a basis for denying remand to state court of state law securities action which had been filed shortly before federal action alleging substantially the same facts, as the state law claims were not barred by res judicata or preempted by federal law, and would only have been within district court's original jurisdiction had they been joined with federal claims, which they were not.

Bruce R. MacLeod, San Francisco, Cal., for plaintiffs-appellants.

Michael F. Perlis and Sharon L. O'Grady, San Francisco, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before SCHROEDER, WIGGINS and THOMPSON, Circuit Judges.

WIGGINS, Circuit Judge:

This is an interlocutory appeal from the district court's order denying plaintiffs' motion to remand plaintiffs' state claims to state court. Plaintiffs filed two parallel securities actions, one in federal court under federal law and one in state court under state law. Defendants removed the state claims to federal court. In its order denying remand, the district court based its decision on its analysis of the "artful pleading" doctrine as articulated in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), and *Salveson* v. *Western States Bankcard Association*, 731 F.2d 1423 (9th Cir.1984). *Moitie* and *Salveson*, however, involved the res judicata effect previously adjudicated federal claims had upon state claims. Because the filing of the federal claims in this case has no res judicata effect upon the state claims, we reverse.

I

The plaintiffs (collectively "Investors") are thirty-four mostly California residents who purchased stock of a Missouri based corporation, Midwestern Companies (Midwestern). Defendants (collectively "FAS-Midwestern") are: First Affiliated Securities, Inc. (FAS), a California stock brokerage firm; Larry Gibson, its broker; and insiders of Midwestern (its former officers, directors, accountants and attorneys).

In February 1985, the Investors filed suit in the California Superior Court for Sonoma County against FAS-Midwestern (the "state action"),[1] alleging, among other claims, fraud, negligent misrepresentation, and breach of fiduciary duty under California common law, and violations of California's "blue sky" securities laws, Cal.Corp. Code §§ 1507(a), 2254, 25401 and 25402. The Investors alleged in part that the Midwestern insiders misrepresented the amount of the company's assets, and that FAS and Gibson misrepresented its income potential.

In March 1985, before serving summons in the state action, the Investors sued FAS-Midwestern in the United States District Court for the Northern District of California (the "federal action"), alleging substantially the same facts and asserting claims under the Securities Exchange Act of 1934 (the "1934 Securities Act"), as amended, 15 U.S.C. §§ 78a et seq., and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

Other Midwestern shareholders brought three federal securities class actions against the Midwestern insiders. The three class actions were consolidated in the United States District Court for the Western District of Missouri. The Investors have opted out of the consolidated class action.[2]

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[1] FAS had earlier sued three of the Investors in the Sonoma County Superior Court to recover amounts allegedly owed for the purchase of Midwestern stock. The three cross-claimed against FAS and Gibson for alleged fraudulent representations in the sale of the stock.

[2] The Investors brought the federal action to avoid duplicative discovery by using discovery from the Missouri litigation in the state action, and to protect against the possibility that the state court would lack personal jurisdiction over the Midwestern insiders. In its order denying remand, the district court questioned whether the Investors could properly maintain the federal action solely to obtain collateral discovery in the state action, but did not sanction them.

In June 1985, FAS-Midwestern removed the state action to the United States District Court for the Northern District of California, then moved to transfer the state and federal actions to the Missouri federal court. The Investors did not contest the transfer of the federal action to Missouri, but moved to remand the state action to the state court for lack of removal jurisdiction. The district court denied the motion to remand, concluding:

> Plaintiffs filed their Federal Action shortly after the filing of their State Action and prior to defendants' removal of the State Action. Further, plaintiffs have evidenced their intention to utilize affirmatively the processes of the federal court to redress the identical claimed injury alleged in their State Action.
>
> In these circumstances, this Court finds that the authorities in this Circuit support defendants' removal of plaintiffs' State Action [citing *Moitie* and *Salveson*]. Plaintiffs' contemporaneous filing of their Federal Action precludes them from defeating removal by the "artful pleading" of the same operative facts as state law claims.

The court denied the Investors' motion for reconsideration of the denial of remand, but certified the remand issue for interlocutory appeal. The Investors timely filed a petition for leave to file an interlocutory appeal, which we granted under 28 U.S.C. § 1292(b).

II

[1,2] Generally, the denial of a motion to remand an action removed from state to federal court under the artful pleading doctrine is a question of federal subject matter jurisdiction which we review de novo. *Bright* v. *Bechtel Petroleum, Inc.*, 780 F.2d 766, 768 (9th Cir.1986). The Supreme Court has suggested, however, that the artful pleading inquiry involves a "factual finding," *Moitie*, 452 U.S. at 397 n. 2, 101 S.Ct. at 2427 n. 2, and in *Salveson* we applied the clearly erroneous standard to the district court's finding of artful

pleading, 731 F.2d at 1429 (citing Fed.R.Civ.P. 52(a)). As the question whether plaintiffs' claims are federal or not would seem to be a legal question, *see Moitie*, 452 U.S. at 409 & n. 5, 101 S.Ct. at 2433 and n. 5 (Brennan, J., dissenting); *Travelers Indem. Co.* v. *Sarkisian*, 794 F.2d 754, 761 n. 9 (2d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986), and there are no disputed facts, we review de novo. *See Bright*, 780 F.2d at 768. The burden of establishing jurisdiction falls on the party invoking the removal statute, *Hunter* v. *United Van Lines*, 746 F.2d 635, 639 (9th Cir.1984), *cert. denied*, ___ U.S. ___, 106 S.Ct. 180, 88 L.Ed.2d 150 (1985), which is strictly construed against removal, *Salveson*, 731 F.2d at 1426.

III

[3] The Investors contend that removal is improper because the state action relies solely on state law for relief. A suit may be removed to federal court under 28 U.S.C. § 1441(a) only if it could have been brought there originally. *See Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 103 S.Ct. 2841, 2846, 77 L.Ed.2d 420 (1983). Federal district courts have original federal question jurisdiction of actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.[3]

[4, 5] We begin our analysis with a fundamental tenet of federal jurisdiction—the "well-pleaded complaint" rule. A case "arises under" federal law within the meaning of section 1331 only if a federal question appears on the face of plaintiff's well-pleaded complaint; original jurisdiction is lacking even if a defense is alleged to be based exclusively on federal law. *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908); *Hunter*, 746 F.2d at 639. The defendant cannot obtain removal jurisdiction merely by asserting a federal defense. *Hunter*, 746 F.2d at 639. The plaintiff is "master to decide what law he will rely upon," *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913), and, if he can maintain his

[3] As the parties are not of completely diverse citizenship, FAS-Midwestern cannot remove on that ground. 28 U.S.C. § 1441(b).

claim on both state and federal grounds, he may ignore the federal question and assert only a state law claim and defeat removal, *Hunter*, 746 F.2d at 641; 1 A J. Moore & B. Ringle, *Moore's Federal Practice* § 0.160[3.—3], at 231-32 (2d ed. 1986).[4]

[6] However, the plaintiff cannot defeat removal by masking or "artfully pleading" a federal claim as a state claim:

> [O]ccasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization. For instance, in many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not. If the only remedy available to plaintiff is federal, because of preemption or otherwise, and the state court necessarily must look to federal law in passing on the claim, the case is removable regardless of what is in the pleading.

14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3722, at 268-75 (2d ed. 1985) (citations omitted). The "artful pleading" doctrine is a narrow exception to the straightforward rules of removal jurisdiction, which we will apply only if "the particular conduct complained of [is] governed exclusively by federal law." *Hunter*, 746 F.2d at 640. Further, we will invoke the doctrine "only in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Salveson*, 731 F.2d at 1427.

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[4] We have questioned the logic of denying removal jurisdiction to a defendant who raises a federal defense. *Hunter*, 746 F.2d at 639. To the extent that the reason for giving federal courts original jurisdiction over federal claims is to assure parties a knowledgable forum for the vindication of federal rights, it makes little sense to permit a defendant to remove only if the plaintiff relies on federal law. *Id.* The American Law Institute has urged Congress to confer removal jurisdiction over cases in which the defendant relies on federal law. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* § 1312 (1969). However, Congress has not seen fit to permit removal unless a plaintiff relies on federal law, and we lack the power to expand our jurisdiction. *Hunter*, 746 F.2d at 639.

[7] A traditional example of the artful pleading doctrine is one in which the defendant has a federal preemption defense to a state claim and federal law provides a remedy. In that case, the defendant can remove the purported state claim. *See Avco Corp.* v. *Aero Lodge No. 735,* 390 U.S. 557, 560, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968) (characterizing state contract claim as claim under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185); *Hunter,* 746 F.2d at 642-43. This is consistent with the rule that jurisdiction cannot be based on a federal defense. *See Hunter,* 746 F.2d at 641-43. If federal law preempts state law and provides a remedy, a plaintiff purporting to plead a state law claim is necessarily relying upon the federal claim, and the federal court to which the action is removed can recharacterize the state claim as a federal one. *Id.* at 642-43. If, however, state law is preempted by federal law and federal law provides no remedy, the state claim cannot be recharacterized as federal, as no federal claim exists, preemption is interposed solely as a defense, and removal is improper. *Id.* at 643.[5]

IV

[8] On the face of the complaint, the Investors have alleged state law claims for fraud and state securities violations. FAS-Midwestern does not contend that federal law preempts these claims. Although the federal courts have exclusive jurisdiction over claims under the 1934 Securities Act, *see Silberkleit* v. *Kantrowitz,* 713 F.2d 433, 436 (9th Cir.1983); 15 U.S.C. § 78aa, federal securities laws do not preempt state securities laws that regulate intrastate offerings of securities and

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[5] Even if federal law provides a remedy, it is unclear why preemption is not simply a defense to a complaint containing only state law claims, rather than a basis of removal. *See Travelers,* 794 F.2d at 758-59 n. 6; 1A J. Moore & B. Ringle, *Moore's Federal Practice* § 0.160[4] (2d ed. 1986); *cf. Illinois* v. *Kerr-McGee Chem. Corp.,* 677 F.2d 571, 577-78 & n. 10 (7th Cir.) (preemption defense held not to permit removal), *cert. denied,* 459 U.S. 1049, 103 S.Ct. 469, 74 L.Ed.2d 618 (1982). The state court is as competent to hear the preemption defense as the federal court. While well-established, the doctrinal distinction between preemption with and without a federal remedy appears to rationalize a narrow exception to the rule that removal cannot be obtained by a federal defense.

affect interstate commerce only incidentally, *see North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 582-83 (9th Cir. 1983) (upholding Ariz.Rev.Stat.Ann. § 44-1841); 15 U.S.C. § 77r (states have concurrent jurisdiction to regulate securities). Instead, FAS-Midwestern argues that the Investors have engaged in "artful pleading" by pleading state claims in state court and federal claims in federal court on the same operative facts. We have previously rejected this argument. *In re Sugar Antitrust Litigation, MDL 201*, 588 F.2d 1270, 1272 & n. 5 (9th Cir.1978) (although California filed a federal anti-trust action in federal district court, then filed similar state antitrust action in state court, removal under artful pleading doctrine or other grounds improper), *cert. denied*, 441 U.S. 932, 99 S.Ct. 2052, 60 L.Ed.2d 660 (1979). Were it not for *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), FAS-Midwestern's argument would be groundless.

In *Moitie*, the plaintiffs filed a federal antitrust action in federal district court. The district court dismissed the action because the plaintiffs lacked standing. Rather than appeal, two plaintiffs, Brown and Moitie, relied on the same facts to assert state law claims in a California court. The defendants removed the actions to federal court. The district court relied on the artful pleading doctrine to deny plaintiffs' motion to remand. On the merits, the district court found the state claims barred by the res judicata effect of the prior federal judgment. On appeal, we affirmed removal, but found res judicata inapplicable because of a subsequent change in the law. *Moitie* v. *Federated Dep't Stores, Inc.*, 611 F.2d 1267 (9th Cir.1980). The Supreme Court reversed the res judicata holding and devoted most of its opinion to that issue. The Court approved the removal in a footnote, noting that "at least some of the claims had a sufficient federal character to support removal" under the artful pleading doctrine. *Moitie*, 452 U.S. at 397, n. 2, 101 S.Ct. at 2427 n. 2. The Court remanded for a determination of which claims were barred by res judicata. Justice Brennan dissented primarily because he believed removal jurisdiction was lacking. *Id.* at 404-410, 101 S.Ct. at 2430-2434 (Brennan, J., dissenting).

The Supreme Court did not explain why the state claims had "sufficient federal character to support removal," 452 U.S. at 397 n. 2, 101 S.Ct. at 2427, n. 2, and the task of divining *Moitie's* theoretical underpinnings has fallen to the lower courts and commentators. Preemption could not support removal, for federal antitrust law has not been held to preempt state laws. *See Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 130, 98 S.Ct. 2207, 2216, 57 L.Ed.2d 91 (1978); C. Wright, *The Law of Federal Courts* § 38, at 217 (1985). Two justifications may be advanced for *Moitie*'s use of the artful pleading doctrine: (1) plaintiff's election of forums by suing in federal court, and (2) federal res judicata. For the following reasons, we reject the election explanation, and instead adopt that of res judicata.

A. ***Election of Forums***

In *Salveson,* we were confronted with facts parallel to *Moitie.* The district court had dismissed a federal antitrust suit. Plaintiffs then filed state claims based on the same facts. We affirmed the district court's denial of plaintiffs' motion to remand on the authority of *Moitie* and affirmed dismissal of the action as res judicata. 731 F.2d at 1429-30.

In *Salveson,* we suggested *Moitie* allowed removal because the plaintiffs consented to federal forum. We said that the plaintiffs, by proceeding in federal court with federal claims, could not be permitted to recast the same claims as state claims to the prejudice of the defendants. *Id.* at 1429. We noted in dictum[6] that *Moitie* permits removal if the plaintiff " 'by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one.' " *Id.* (quoting *Salveson* v. *Western States Bankcard Ass'n,* 525 F.Supp. 566, 577 (N.D.Cal.1981), *aff'd in part and rev'd in part,* 731 F.2d 1423 (9th Cir.1984). *Accord Travelers Indem. Co.* v. *Sarkisian,* 794 F.2d 754, 760-761 (2d Cir.) (having elected to proceed in federal court and "having foregone the opportunity to plead a pendent state claim, [the

[6] We stated that an alternative ground for removal in *Moitie* was the res judicata effect of the federal judgment. *Salveson,* 731 F.2d at 1427, 1429 (*see infra* section IVB).

plaintiff is] not free to abuse the dual court system by filing in state court a second lawsuit and resubmitting his claim as one based solely on state law"), *cert. denied*, ___ U.S. ___, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986); *Reid* v. *Walsh*, 620 F.Supp. 930 (M.D.La.1985) (state securities action properly removed to federal court because plaintiffs filed federal securities action on the same general facts).

Adoption of this consent rationale would put a plaintiff who could file both state and federal claims to an election of forums and remedies. To maintain his state claim in state court without risking removal, he could not assert his federal claim either in federal or state court. If he filed the federal claim with the state claim in state court, the defendant could remove the state claim based on pendent jurisdiction. *Bale* v. *General Tel. Co.*, 795 F.2d 775, 778 (9th Cir.1986). If he filed a separate federal action, the defendant could still remove the state claim based on the election to proceed in federal court.

Requiring plaintiffs to submit to this election would avoid splitting of claims arising from the same facts, simplify mass litigation, save judicial resources, and balance the plaintiffs' choice of forum against the defendants' interest in avoiding multiple litigation. For example, holding the Investors to their election would lead to consolidation of the state action with the Missouri litigation.

[9] However, the election rationale has serious flaws. First, the Supreme Court in *Moitie* did not articulate the election theory, and that approach had never been accepted as justifying removal before *Moitie*. *See Sugar Antitrust Litigation*, 588 F.2d at 1272; C. Wright, *The Law of Federal Courts* § 38, at 217 (1985). It is the traditional rule that the parties cannot by consent, waiver or estoppel obtain federal subject matter jurisdiction. *See Knaefler* v. *Mack*, 680 F.2d 671, 676 n. 5 (9th Cir. 1982); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3522, at 66-67 (2d ed. 1984). Yet the election approach would confer removal jurisdiction over state

claims based on the plaintiffs' waiver of lack of jurisdiction by consent to the federal forum.[7]

Second, the election approach is inconsistent with the removal statute. A suit may be removed from state court if it arises under federal law. 28 U.S.C. §§ 1331, 1441(a). FAS-Midwestern does not argue that the Investors' state claims are actually federal claims, nor that there is a federal defense to the state claims. Federal law is only interjected because the claims would have been pendent claims had they been filed in the same complaint with federal claims. *See Blake* v. *Pallan*, 554 F.2d 947, 956-57 n. 11 (9th Cir. 1977). As the state and federal claims were filed separately, the state claims are not pendent, nor within original federal jurisdiction, and do not arise under federal law.

Third, the election justification does not conform to traditional notions of removal under the artful pleading doctrine. The doctrine permits courts to recharacterize state claims as federal claims if the plaintiff has attempted to defeat removal by omitting to plead necessary federal questions. *Franchise Tax*, 463 U.S. at 22, 103 S.Ct. at 2852. The Investors have not failed to plead necessary federal law. Although their state claims are based on the same operative facts as their federal claims, the state claims are created and governed by state law, and in the absence of preemption cannot be characterized as federal claims. *Sugar Antitrust Litigation*, 588 F.2d at 1272 n. 5. Because the Investors' claims are not preempted, there is no basis to recharacterize their claims as federal claims.

Fourth, acceptance of the election theory would expand removal jurisdiction to a significant number of state cases in which the plaintiff has filed a parallel federal case, contrary to principles of federalism. "So long as States retain authority to

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[7] Justice Blackmun, joined by Justice Marshall, concurred in *Moitie*, suggesting a much narrower consent rationale for removal; by failing to cross-petition from the Ninth Circuit's judgment that the state claims were merely disguised federal claims, the argument that the case should be remanded to state court should be barred by res judicata. 452 U.S. at 404, 101 S.Ct. at 2430 (Blackmun, J., concurring). *Accord Vitarroz Corp.* v. *Borden, Inc.*, 644 F.2d 960, 964-65 (2d Cir.1981) (by failing to move to remand to state court, plaintiff accepted defendant's characterization of its state claim as one based on federal law).

legislate in subject areas which Congress had legislated without preempting the field, and so long as state courts remain the preferred forum for interpretation and enforcement of state law, plaintiffs must be permitted to proceed in state court under state law." *Moitie*, 452 U.S. at 407, 101 S.Ct. at 2432 (Brennan, J., dissenting); *accord Sugar Antitrust Litigation*, 588 F.2d at 1273 (in the absence of preemption, "the state should be free" to construe its laws); *see United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Needless [federal] decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law").

Fifth, attempts to place limits on the scope of the election rationale have been unsatisfactory. The Second Circuit allows removal based on a plaintiff's election only if he filed substantially similar state and federal claims, and filed the federal claim in federal court first. *Travelers*, 794 F.2d at 760-61 (denying removal because state claim not substantially similar). The requirement of substantial similarity of claims seems unsound. A state claim that shares elements of a federal claim no more arises out of federal law than any claim would that arose out of the same operative facts as the federal claim. Also, the order of filing should make no difference. Regardless of the filing order, the plaintiff will have elected to use the federal forum and to split his claims.

In *Powers* v. *South Central United Food & Commercial Workers Union* [sic], 719 F.2d 760, 766 & n. 5 (5th Cir.1983), the plaintiff filed parallel state and federal actions. The Fifth Circuit held that removal was improper because, in contrast to *Moitie*, the plaintiff had "not evidenced a desire to proceed under federal law; rather, she has consistently and vociferously attempted to avail herself of the state forum," *id.* at 766, and she filed the federal suit after the state suit as a tactical maneuver to protect against the running of the statute of limitations, *id.* at 766 n. 5. The Fifth Circuit's distinctions are not persuasive. The amount of effort plaintiff expended in the state forum, and her motives for filing the federal action,

whether tactical or not, are irrelevant if removal is justified by the election to pursue the federal action.

B. *Res Judicata*

A less expansive explanation for *Moitie's* use of the artful pleading doctrine is that *Moitie* permits removal only if a federal res judicata defense is present. In *Salveson* we suggested *Moitie* was so limited. We said that in both *Moitie* and *Salveson* the plaintiffs had first filed federal claims in federal court and lost, and then attempted to recharacterize those same claims in state court. 731 F.2d at 1429. We said that the state claim "was really the same [federal] claim in disguise against which summary judgment had already been entered, and . . . was barred by res judicata." *Id.* at 1427.

Moitie found removal justified because of the "federal character" of the state claims. 452 U.S. at 397 n. 2, 101 S.Ct. at 2427 n. 2. Considering federal res judicata principles as the source of that "federal character" has support in the *Moitie* opinion. The Supreme Court dedicated most of its opinion to res judicata, giving cursory treatment to removal. *Moitie* can thus be construed as permitting removal only of state claims filed to circumvent the res judicata impact of a federal judgment. *See Hunter,* 746 F.2d at 641-42 (citing *Salveson* for the proposition that *Moitie* permits removal in the res judicata context); *Magic Chef, Inc.* v. *International Molders & Allied Workers Union,* 581 F.Supp. 772, 776 n. 4 (E.D.Tenn.1983); *Gold* v. *Blinder, Robinson & Co.,* 580 F.Supp. 50, 53 n. 1 (S.D.N.Y.1984) (*Moitie* is "an aberration, necessary in light of the unusual facts of that case"); 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3722, at 305-06 n. 108 (2d ed. 1985).

[10] This rationale has been criticized. The res judicata impact of a federal judgment is a question of federal law which a state court is bound to apply under the Supremacy Clause. *See Limbach* v. *Hooven & Allison Co.,* 466 U.S. 353, 361-62, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984). The state court is competent to apply federal res judicata in the state lawsuit, and res judicata would be interposed as a defense which ordinarily would not support removal. *See Travelers,* 794 F.2d at 761 nn.

8 & 10; C. Wright, *The Law of Federal Courts* § 38, at 217 (1985). But as in the case of federal preemption coupled with a federal remedy, we can recharacterize a state claim barred by the res judicata effect of a federal judgment as an artfully pleaded federal claim. The federal judgment would ordinarily preclude the plaintiff from relitigating any federal or state claim arising out of the same operative facts. A purported state claim based on those facts would be in effect the same federal claim against which the judgment had been entered. *See Salveson*, 731 F.2d at 1427. The removing court could thus recharacterize the state claim as an artfully pleaded federal claim filed to circumvent the res judicata effect of the federal judgment. *See, e.g., id.*

Further, the courts have already developed an exception to the rule that a federal defense cannot support removal in the preemption context—along with an elaborate explanation of why preemption is not merely a defense but also a means of recharacterizing a state claim as federal (see supra n. 5)—and this interpretation of *Moitie* only creates another narrow exception in the res judicata context.

[11] Construing *Moitie* as limited to the removal of state claims precluded by a federal judgment is consistent with the removal statute. Because of the presence of federal res judicata, the state claims in *Moitie* had a substantial federal component, and so arguably arose from federal law. Adopting the res judicata rationale also squares our decisions in *Salveson*, permitting removal in the res judicata context, with *Sugar Antitrust Litigation*, denying removal in the context of parallel state and federal litigation, and comports with our policy of invoking the artful pleading doctrine "only in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Salveson*, 731 F.2d at 1427. We therefore construe *Moitie* as limited to removal of state claims precluded by the res judicata effect of a federal judgment. Because the Investors' claims are framed under the state law, are not barred by res judicata nor preempted by federal law, and would only have been within the district court's original jurisdiction had they been joined with federal claims, which

they were not, we reverse the district court's denial of plaintiffs' motion to remand the state action to state court.[8]

V

Removal of the Investors' state action might promote judicial economy. However, while "complex state and federal actions proceeding simultaneously against the same parties [may] pose grave problems in the management of litigation," *Sugar Antitrust Litigation*, 588 F.2d at 1273, we are not free "to implement policies, such as coordination with pending multidistrict litigation, which, though desirable, lie beyond the scope of the removal statute." *Salveson*, 525 F.Supp. at 575.

Other means are available to courts to coordinate duplicative state and federal litigation. The federal courts can in limited, appropriate cases stay federal actions because of pending state actions. *See, e.g., Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *Tovar* v. *Billmeyer*, 609 F.2d 1291, 1293 (9th Cir.1979). The California courts also have the power to stay state litigation pending resolution of parallel federal litigation. *See Thomson* v. *Continental Ins. Co.*, 66 Cal.2d 738, 747,

[8] FAS-Midwestern offers two alternative grounds for removal: pendent jurisdiction and waiver. It argues that the district court can remove the state claims because they arise out of the same operative facts as the federal claims and would be within the district court's original pendent jurisdiction if filed with the federal claims. It relies on *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). *Gibbs* does not support this proposition. *Gibbs* held that the federal courts have the power to hear state claims which the plaintiff has *chosen* to file in the same complaint with federal claims. It is implicit in this holding that the plaintiff can choose to file parallel state and federal actions. *Gibbs* acknowledged that the state forum is often the better one to hear state claims. *Id.* at 726. FAS-Midwestern cites no authority for its proposed extension of the doctrine of pendent jurisdiction to state claims that are not appended at all to federal claims, but rather filed in a separate lawsuit.

FAS-Midwestern also argues that the Investors are estopped from asserting or have waived their right to remand to the state court because they are using their federal action improperly to gain a discovery advantage in state court, and have unfairly split their cause of action. The plaintiff cannot confer removal jurisdiction by waiver or estoppel. *Knaefler*, 680 F.2d at 676 n. 5.

59 Cal.Rptr. 101, 427 P.2d 765 (1967); 2 B. Witkin, *California Procedure, Jurisdiction* § 349 (3d ed. 1985). The state court would later determine if the federal judgment were res judicata on the state litigation. *See* 2 B. Witkin, *supra*, § 348. While the power of federal courts to enjoin state proceedings is limited, *see* 28 U.S.C. § 2283, FAS-Midwestern could also consider moving in federal court to enjoin the state action. *Sugar Antitrust Litigation*, 588 F.2d at 1273-74 n. 7. By means of stays, injunctions, and the doctrine of res judicata, federal and state courts can coordinate parallel state and federal litigation without manipulating the removal statute to promote policies beyond its scope.

The district court's order denying the Investors' motion to remand is REVERSED. The case is REMANDED to the district court to remand the state action to state court.

APPENDIX II

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARY LOU SULLIVAN, et al., *Plaintiffs,* v. FIRST AFFILIATED SECURITIES, INC., et al., *Defendants.*	**No. C-85-3850-JPV** **ORDER DENYING PLAINTIFFS' MOTION TO REMAND AND GRANTING DEFENDANTS' MOTIONS TO TRANSFER VENUE OF RELATED ACTIONS**

On August 1, 1985, there came on regularly for hearing the following motions: plaintiffs' motion to remand, pursuant to 28 U.S.C. § 1447(c), Case No. C 85 3850 JPV to the Superior Court of the State of California for the County of Sonoma; the motion by all defendants to transfer both of the above-captioned actions, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Western District of Missouri; and the requests of certain defendants for sanctions against plaintiffs and/or plaintiffs' counsel.

Having considered the memoranda filed by the parties relating to these motions, the evidence submitted in support thereof, the pleadings to which these motions relate, and the arguments of counsel, the Court finds as follows:

1. Case No. C 85 3850 JPV, originally filed by plaintiffs' [sic] in Sonoma County Superior Court (the "State Action"), was properly removed to this Court by defendants.

a. Plaintiffs filed their State Action on February 7, 1985. Shortly thereafter, on March 4, 1985, the same plaintiffs filed their action against the same defendants in this Court, Case No. C 85 2151 JPV (the "Federal Action").

b. Plaintiffs' complaints in their State Action and their Federal Action involve the same parties, contain virtually identical factual allegations, and seek redress for the same alleged wrong.

c. On June 14, 1985, defendants timely removed plaintiffs' State Action to this Court. All defendants who received plaintiffs' complaint in the State Action either joined in the Petition For Removal, filed June 14, 1985, or timely joined thereafter.

d. Plaintiffs' objections to removal on the grounds that defendant Ronald Walker never joined the removal are overruled. Plaintiffs failed to rebut the evidence presented by defendants that defendant Ronald Walker never received a copy of the Complaint in the State Action and therefore was not required, under 28 U.S.C. § 1446(a), to join in the removal.

e. Plaintiffs filed their Federal Action shortly after the filing of their State Action and prior to defendants' removal of the State Action. Further, plaintiffs have evidenced their intention to utilize affirmatively the processes of the federal courts to redress the identical claimed injury alleged in their State Action.

f. In these circumstances, this Court finds that the authorities in this Circuit support defendants' removal of plaintiffs' State Action. *Salveson* v. *Western States Bankcard Ass'n.*, 525 F.Supp. 566 (N.D. Cal. 1981), *aff'd. in relevant part*, 731 F.2d 1243 [*sic*] (9th Cir. 1984); *see also Moitie* v. *Federated Department Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980), *rev'd. on other grounds*, 452 U.S. 394

(1981). Plaintiffs' contemporaneous filing of their Federal Action precludes them from defeating removal by the "artful pleading" of the same operative facts as state law claims.

g. The case of *Powers* v. *South Central Union Food & Commecial* [*sic*] *Workers' Union* [*sic*], 719 F.2d 760 (5th Cir. 1983), principally relied upon by plaintiffs in support of their remand motion, is distinguishable from the instant case in two important respects: (i) the plaintiff there filed her federal action after defendants had removed the state court action to federal court and (ii) the plaintiff there filed her federal action as a purely defensive tactic to protect against the expiry of the applicable statute of limitations in the event she was forced to proceed in federal court. *Id.* at 766 n.5. In contrast, plaintiffs here filed their Federal Action prior to defendants' removal of their State Action and plaintiffs have acknowledged their desire affirmatively to invoke the jurisdiction of the federal courts and to utilize its processes. This Court therefore finds that removal of the State Action is proper under the principles articulated in *Salveson* and *Moitie*.

h. This Court has jurisdiction over plaintiffs' Federal Action founded on claims arising under the laws of the United States.

i. The claims asserted in Plaintiffs' State Action and the federal claims asserted in their Federal Action derive from a common nucleus of operative fact, pleaded virtually identically in the two actions.

j. The claims asserted in Plaintiffs' State Action and in their Federal Action are such that plaintiffs would ordinarily be expected to try them in one judicial proceeding, because, according to Plaintiffs' complaints, the facts to be tried in each action are the same.

k. The State Action is a civil action over which this Court has original pendent jurisdiction founded on claims arising under federal law alleged in the Federal Action.

2. Venue over both plaintiffs' related actions more appropriately lies in the Western District of Missouri:

a. There are already pending in that district the following actions relating to The Midwestern Companies: (i) a consolidated securities action, containing class allegations, and including virtually all of the defendants in these actions; (ii) an action by the directors [sic] and officers [sic] liability insurer against the officer and director defendants, including certain of the defendants in these actions; and (iii) the Chapter 11 bankruptcy cases filed in that district by The Midwestern Companies and its subsidiary, Titan.

b. The events giving rise to the majority of plaintiffs' claims in these actions occurred in that district.

c. The majority of defendants in these actions reside in or near that district.

d. The majority of non-party witnesses whose testimony will be relevant to these actions reside in or near that district.

e. The majority of the documentary evidence relevant to these actions is located in that district. The documentary evidence in the possession of The Midwestern Companies is subject to orders of the Bankruptcy Court in that district.

f. There is no statutory authority for plaintiffs' request for a transfer to that district for the limited purpose of pretrial discovery only. In all events, such a limited transfer will only serve to place an additional burden on judicial resources and will not serve the interests of justice.

3. Although this Court questions plaintiffs' actions in filing their Federal Action for the reasons stated by them, and is confronted by a close question in considering defendants' requests for sanctions, this Court does not find that plaintiffs' conduct was motivated by bad faith or was so egregious so as to warrant imposition of sanctions.

In view of the above findings, and good cause appearing,

IT IS HEREBY ORDERED that plaintiffs' motion to remand Case No. C 85 3850 JPV be and hereby is denied.

IT IS FURTHER ORDERED that defendants' motions to transfer Case Nos. C 85 2151 JPV and C 85 3850 JPV to the Western District of Missouri be and hereby are granted.

IT IS FURTHER ORDERED that the Clerk of this Court is directed to prepare the docket in both actions and transfer forthwith Case Nos. C 85 2151 JPV and C 85 3850 JPV to the United States District Court for the Western District of Missouri.

IT IS FURTHER ORDERED that the requests of certain defendants for sanctions against plaintiffs and/or plaintiffs' counsel be and hereby are denied.

DATED: Aug 26, 1985

JOHN P. VUKASIN, JR.

United States District Judge

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY LOU SULLIVAN, et al, *Plaintiffs-Appellants,* v. FIRST AFFILIATED SECURITIES, INC., et al, *Defendants-Appellees.*	No. 85-2961 D.C. No. C 85-3850-JPV ORDER

Before: SCHROEDER, WIGGINS AND THOMPSON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX IV

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARY LOU SULLIVAN, et al.,

Plaintiffs,

v.

FIRST AFFILIATED SECURITIES, INC. et al.,

Defendants.

No. C-85-3850 JPV
ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND CERTIFYING DENIAL OF PLAINTIFFS' MOTION TO REMAND FOR INTERLOCUTORY APPEAL

The Court having ordered plaintiffs' motion for reconsideration of its August 26, 1985, Order Denying Plaintiffs' Motion to Remand and Granting Defendants' Motions to Transfer Venue of Related Actions submitted on the pleadings, and having fully considered the briefs in support and opposition thereto, the Court is of the opinion that plaintiffs have failed to adduce new material sufficient to warrant reconsideration of the aforesaid Order. Accordingly, plaintiffs' motion for reconsideration is DENIED.

However, the Court further believes that plaintiffs have demonstrated good cause for certification of the issues presented by the motion to remand for immediate appeal pursuant to 28 U.S.C. § 1292(b). The issue of whether removal is proper in the precise circumstances presented by this case is apparently one of first impression and, accordingly, involves a controlling

question of law as to which there is substantial ground for difference of opinion. The Court is of the further opinion that an immediate determination of these questions on appeal may materially advance the ultimate determination of this litigation in that, if the removal here is found to have been improvident, the parties will have been spared the time and expense of litigation of this matter in the United States District Court for the Western District of Missouri, only to face relitigation of the same matters should the Court's ruling on the motion to remand prove to have been incorrect.

Accordingly, IT IS HEREBY ORDERED:

(1) That plaintiffs' motion for reconsideration of this Court's prior Order denying their motion to remand in case number C-85-3850 JPV is DENIED;

(2) That plaintiff's motion for certification of those portions of the Order denying the motion to remand is GRANTED, and that the Order, as it relates to case number C-85-3850 JPV, is CERTIFIED for interlocutory appeal pursuant to 28 U.S.C. § 1292(b); and

(3) That in all other respects this Court's Order of August 26, 1985, stands.

Dated: SEP 17, 1985

J. P. VUKASIN, JR.

J. P. VUKASIN, JR., JUDGE
UNITED STATES DISTRICT COURT

APPENDIX V

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY LOU SULLIVAN, et al.,
Plaintiffs-Appellants,

vs.

FIRST AFFILIATED SECURITIES INC., et al.,
Defendants-Appellees.

No. 85-2961
DC CV 85-2850 JPV

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41 (b) Fed.R.App.P.)

Upon due consideration of appellees' motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before July 17, 1987,

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby STAYED.*

CHARLES E. WIGGINS

Charles E. Wiggins
United States Circuit Judge

* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-102

In The
Supreme Court of the United States
October Term, 1987

FIRST AFFILIATED SECURITIES, INC.,
a California corporation, *et al.*,

Petitioners,

v.

MARY LOU SULLIVAN, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should this Court review the decision of the Ninth Circuit remanding this purely state-law case to state court, where

(1) the decision is correct under a long and unbroken line of decisions of this Court recognizing a right to maintain parallel state and federal actions;

(2) the result is dictated by the well-pleaded complaint rule which has been recognized by this Court for over a century; and

(3) there is no conflict among the Circuits in the result which would have been reached under the facts of this case.

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STATEMENT OF THE CASE

This action is one of five related cases, four of which were filed in California Superior Court and one in federal court, involving overlapping parties. The litigation began in mid-1984 when petitioner First Affiliated Securities, Inc. ("FAS"), a brokerage firm with offices in Santa Rosa, California, brought three actions in the Superior Court of California for Sonoma County. In those actions, FAS sought to recover deficits in the margin accounts of Mary Lou Sullivan, Kenneth Martin, and Malm Metal Products, Inc. (three of the respondents here) that resulted from massive losses from investments in the stock of Midwestern Companies ("Midwestern"). In late 1984, the three investors responded by filing cross-complaints against FAS and its broker, Larry Gibson, also in Sonoma County Superior Court. (Appendix ("App.") I to Petition ("Pet") at A-5 and n.1)

The events underlying the Sullivan, Martin and Malm cross-complaints involved more victims than just Sullivan, Martin and Malm, and more defendants than just FAS and Gibson.[1] Consequently, in February 1985, the 34 respon-

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[1] The facts underlying the litigation occurred in two different spheres, California and Missouri. The California sphere involved the conduct of defendants FAS and its broker, Gibson, in touting Midwestern stock in Santa Rosa, California. These California defendants made misrepresentations involving both publicly disseminated data, such as inflated sales and earnings figures, and false, purportedly "inside" information, such as misrepresentations regarding "imminent" mergers which never took place. In addition, defendants FAS and Gibson engaged in substantial unauthorized trading and made material misrepresentations regarding margin requirements. Initially, the California defendants

(Continued on following page)

dents joined to file the instant complaint in Sonoma County, anticipating that all of the Sonoma County actions (theirs and the three suits filed by FAS) would be consolidated for trial in Sonoma County Superior Court. (App. I at A-5) The respondents' state-court complaint stated no cause of action based upon federal law. (App. I at A-9) Because most of the respondents and several of the petitioners were citizens of California, federal diversity jurisdiction did not exist.

Meanwhile, other investors in Midwestern had already brought three federal securities class actions against Midwestern officers and related parties. Those class actions were consolidated in the United States District Court for the Western District of Missouri. (App. I at A-5) Respondents have opted out of the consolidated class actions,

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(Continued from previous page)

made misrepresentations to generate sales. Later, the misconduct occurred as part of a conspiracy to lend artificial support to the price of Midwestern shares so as to forestall a collapse in the market for Midwestern, with attendant losses to FAS and the Midwestern insiders. With respect to the California aspect of the case, virtually all of the transactions, evidence, and witnesses, including 32 respondents, are located in the Santa Rosa, California area.

The Missouri sphere of the case involves publicly disseminated misrepresentations by the officers, directors, attorneys and accountants of Midwestern, whose headquarters were in Missouri prior to Midwestern's bankruptcy. Respondents' complaint alleges that Midwestern, which had been a shelf corporation, was re-activated to engage in a sophisticated and nationwide stock promotion fraud. The SEC has obtained a consent decree from Midwestern, and three securities class actions against Midwestern's insiders, attorneys and accountants involving the publicly disseminated misrepresentations have been transferred and consolidated in the United States District Court for the Western District of Missouri (Kansas City).

because the class actions did not involve (1) petitioner FAS, (2) misrepresentations by brokers, (3) unauthorized trading, (4) false purported "inside" information, or (5) misrepresentations about margin requirements, all of which are at the heart of the California aspect of this case.

In March 1985, a month after filing their state-court complaint, respondents filed an action in the United States District Court for the Northern District of California, alleging substantially the same facts but asserting claims under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, and the Racketeer Influenced and Corrupt Organizations statutes, 18 U.S.C. §§ 1961-1968 (App. I at A-5); they later amended the complaint to add a claim under the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*

Respondents brought the federal action to avoid duplicative discovery by using discovery from the Missouri litigation in the state action, and to protect against the possibility that the state court would lack personal jurisdiction over the non-resident petitioners. (App. I at A-5 n.2) Respondents intended to prosecute the federal action only in the event that the California court could not exercise personal jurisdiction over all major defendants. If California jurisdiction is upheld, respondents plan to proceed to trial in state court and to dismiss the federal complaint.

On June 14, 1985, petitioners removed this action from the California Superior Court to federal court. Because diversity among the parties was lacking, petitioners asserted federal-question jurisdiction as their basis for removal despite the fact that the complaint alleged purely state-law causes of action: petitioners argued that "though

couched in terms of state law, the facts alleged in the state complaint raise essentially federal law claims."

On July 1, 1985, respondents moved to remand the case under 28 U.S.C. § 1447(c), asserting that the state-court complaint did not arise under federal law. On August 26, 1985, the District Court denied respondents' motion to remand, accepting petitioners' invocation of the "artful pleading" doctrine. (App. II at A-19 to -23) The court simultaneously granted petitioners' motions to transfer the state and federal actions to the Western District of Missouri. (*Id.*) The three lawsuits begun by FAS against three of the respondents remain pending in Sonoma Superior Court.

After denying remand of the state-law case to Superior Court, the District Court denied a motion for reconsideration but certified the jurisdictional issue for interlocutory appeal to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). (App. IV at A-25 to -26) On December 27, 1985, the Court of Appeals for the Ninth Circuit granted leave for respondents to file an interlocutory appeal. On April 1, 1987, the Ninth Circuit reversed the denial of the motion to remand the case; it remanded the case to the District Court for remand to Sonoma Superior Court. (App. I at A-1 to -18) On June 10, 1987, the Ninth Circuit unanimously denied a petition for rehearing and a suggestion for rehearing *en banc*. (App. III at A-24) Petitioners now seek a writ of certiorari from this Court.

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SUMMARY OF ARGUMENT

There is nothing new about having two parallel cases work their way through federal and state courts at the same time. When respondents (plaintiffs below) filed separate state and federal actions, with the state-court complaint limited to state-law claims and the federal complaint asserting only federal claims, both state and federal courts were empowered to proceed until one court reached a judgment that could form the basis of a *res judicata* defense in the other.

Petitioners suggested in the Court of Appeals a bizarre new theory of "pendent case" jurisdiction, by which they claim to be able to remove a case that contains no federal ingredient and does not involve diverse parties merely because a parallel, purely federal-law action was filed in federal court a month after the state-court complaint was filed. Alternatively, petitioners asserted that respondents had "artfully pled" federal claims as state-law claims, even though (1) respondents had pressed their federal claims separately, in federal court, and did not avoid federal law; (2) none of the state-law claims were pre-empted by federal law; (3) no federal judgment barred litigation of related state-law claims; and (4) respondents' state-law claims had no essential and necessary federal ingredient.

The Court of Appeals was correct in rejecting petitioners' startling revision of long-standing jurisdictional rules. Motivating forces for such a revision—the imagined problems arising from parallel litigation—are a consequence of the dual judicial system created by the Consti-

tution, and they are already remedied by existing doctrines and procedures.

There is no reason for this Court to prevent parallel litigation by disturbing the balance of federal and state court power and the constitutional design of overlapping and parallel jurisdictions. Nor is there any justification for altering the well-pleaded complaint rule which would result in federal jurisdiction in this case *only* if respondents' state-law securities claims were *necessarily* federal.

Petitioners' argument that the Ninth Circuit's decision "renders *Moitie* removal purposeless" is peculiar in light of the fact that *Moitie* itself evidenced no purpose of this Court to authorize removal in this case. Moreover, petitioners' criticism of the Ninth Circuit for expanding the "artful pleading" doctrine to allow federal jurisdiction on the ground not only of pre-emption but also of *res judicata* is irrelevant. Even under the Ninth Circuit's expanded view of artful pleading, there is no basis for removal of this case, which involves neither pre-emption nor *res judicata*.

The decisions of the Second and Fifth Circuits reinforce the decision of the Ninth Circuit in this case. *All three Courts of Appeals overturned removal in the cases cited by petitioners. The Second and Fifth Circuits would have joined the Ninth Circuit in overturning removal in this case.* There are subtle differences in rationale among the Courts of Appeals, but the decisions are not in conflict with respect to this case. Any effort by this Court to harmonize those subtle differences would merely be an academic exercise without any effect on the result in this case.

REASONS FOR DENYING THE WRIT

I. PARALLEL LITIGATION IN FEDERAL AND STATE COURTS IS A FEATURE, LONG RECOGNIZED BY THIS COURT, OF OUR DUAL COURT SYSTEM.

A. This Court Has Frequently Upheld The Right Of A Party To Conduct Parallel Litigation.

Petitioners hope to establish a rule that a complaint filed in state court with only state-law claims, well pleaded by itself, becomes "artfully" pleaded when a later federal action with only federal claims is instituted. According to petitioners' theory, the subsequent filing of the federal complaint federalizes the earlier state complaint, making it subject to removal to federal court.

Petitioners' proposal flies in the face of our federal system and this Court's decisions. The unique nature of our federal system, with state courts of general jurisdiction and federal courts of limited jurisdiction, creates an opportunity for concurrent proceedings in the separate systems that has long been recognized by this Court. In *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), the Court considered circumstances in which state and federal cases presented substantially the same issues and sought *in personam* relief. The Court observed:

> Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* [sic] by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any

> other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

260 U.S. at 230. *See also Princess Lida v. Thompson,* 305 U.S. 456, 466 (1939).

In *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970), the Court explained concurrent jurisdiction of federal and state courts when parallel lawsuits were filed. The Court stated:

> Although the federal court did have jurisdiction of the railroad's complaint based on federal law, the state court also had jurisdiction over the complaint based on state law and the union's asserted federal defense as well. *While the railroad could probably have based its federal case on the pendent state law claims as well, it was free to refrain from doing so and leave the state law questions and the related issue concerning preclusion of state remedies by federal law to the state courts.* Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone. *In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.*

398 U.S. at 295 (citations omitted; emphasis added).

In *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518, 106 S.Ct. 768 (1986), this Court reversed a decision of the Eleventh Circuit that had upheld an injunction of state court proceedings in order to protect a federal judgment. The Court stated:

> The Court of Appeals also felt that the District Court's injunction would discourage inefficient simultaneous litigation in state and federal courts on the same issue . . . . *But this is one of the costs of our dual court system* . . . .

474 U.S. at —, 106 S.Ct. at 772 (emphasis added). The Court then quoted from *Atlantic Coast Line* the language (quoted *supra* at 8) concerning the right of a party to pursue claims simultaneously in both courts. *Parsons Steel,* 474 U.S. at —, 106 S.Ct. at 772 (quoting *Atlantic Coast Line,* 398 U.S. at 295).

In *Pennzoil Co. v. Texaco, Inc.,* — U.S. —, 107 S.Ct. 1519 (1987), this Court most recently addressed varying doctrines of abstention in light of Texaco's federal challenge to Texas judicial proceedings. The Court observed that the abstention doctrines are "designed to soften the tensions inherent in a *system that contemplates parallel judicial processes.*" — U.S. at —, n.9, 107 S.Ct. at 1526, n.9 (emphasis added). Indeed, under the abstention doctrine recognized in *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (1941), parallel litigation in state and federal courts, with a stay of the federal proceedings, has been *required* by this Court. *See England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 424 (1964).

B. Numerous Remedies Already Exist To Alleviate Any Problems Of Parallel Litigation, And No New Species Of Federal "Pendent Case" Jurisdiction Need Be Created To Solve Those Problems.

Because our constitutional structure of a dual judicial system makes parallel litigation possible, courts have de-

vised doctrines and methods for remedying problems[2] of multiple litigation without dong violence to the balance of federal-state power.

Foremost among the doctrines limiting the dangers of parallel litigation is *res judicata;* and this Court, in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981), upheld that doctrine in the face of an attempt by the Court of Appeals for the Ninth Circuit to weaken it in particular circumstances. This Court has often recognized that *res judicata* ultimately resolves any problem of multiple litigation. *See, e.g., Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. —, —, 106 S.Ct. 768, 772-773 (1986); *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295 (1970).

Another such doctrine is abstention. *See Pennzoil Co. v. Texaco, Inc.,* — U.S. —, 107 S.Ct. 1519 (1987); *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976).

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[2] In any event, the "problems" of parallel litigation are frequently exaggerated. Manual for Complex Litigation Second § 31.31 (1985) notes *advantages* to the filing of simultaneous claims in state and federal courts, including the availability of federal discovery procedures:

> The fact that the courts have different procedures is sometimes an advantage. For example, the existence of state court procedures for interlocutory appeals may provide a means for obtaining an early appellate ruling on a critical issue of state law, *while the federal procedures may permit discovery to be conducted in a more expeditious and efficient manner.*

(Emphasis added.) Respondents filed parallel lawsuits precisely to achieve greater flexibility and efficiency in litigation. As individual investors suing institutional parties such as a Big Eight accounting firm and a national brokerage firm, they had no desire to create additional burdens on themselves.

Finally, in extreme cases the federal court may, to protect its own jurisdiction, enjoin state court proceedings before they reach judgment. *See Parsons Steel,* 474 U.S. at —, 106 S.Ct. at 771.

II. THE WELL-PLEADED COMPLAINT RULE, RECOGNIZED BY THIS COURT FOR OVER A CENTURY, REQUIRES REMAND OF THIS STATE-LAW CASE.

Petitioners base their entire argument upon a solitary footnote in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 397 n.2 (1981). If petitioners are correct that *Moitie* provides some authority for removal in this case, then *Moitie* overruled or modified the well-pleaded complaint rule. Examination of this Court's decisions before and after *Moitie,* however, shows that *Moitie* had no such effect.

Petitioners have been unable to articulate any rule that *Moitie* stands for—or they have been unwilling to state explicitly what they want it to stand for, namely that a purely state-law action in state court is "federalized" and made removable merely by the filing of a related federal action, because the absurdity of such a rule would be manifest. Study of *Moitie* itself, as shown below at 14, reveals that it formulated no general principle of jurisdiction that would apply to this case.

A. Earlier Decisions.

Numerous cases have established and recognized the well-pleaded complaint rule as a cardinal principle of federal jurisdiction. In *Tennessee v. Union & Planters' Bank,* 152 U.S. 454 (1894), the Court compared the effect of the Act of March 3, 1887, ch. 373, 24 Stat. 552, as amended by

Act of August 13, 1888, ch. 866, 25 Stat. 434, with the Act of March 3, 1875, ch. 137, 18 Stat. 470. Quoting cases decided under the 1875 Act, the Court stated:

> "[T]he question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party." *Central Railroad v. Mills,* 113 U.S. 249, 257 [(1885)].

Union & Planters' Bank, 152 U.S. at 460. Noting that the 1887-88 Acts restricted federal jurisdiction to a narrower scope than the 1875 Act, the Court observed:

> The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit [now District] Courts of the United States.

Id. at 462. *See also Louisville & Nashville Railroad Co. v. Mottley,* 211 U.S. 149 (1908); *Shulthis v. McDougal,* 225 U.S. 561, 569 (1912).

In *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25 (1913), Justice Holmes stated:

> Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a "suit arising under" the . . . law of the United States by his declaration or bill.

In *Healy v. Sea Gull Specialty Co.,* 237 U.S. 479, 480 (1915), he further explained that "[*t*]*he plaintiff is absolute master of what jurisdiction he will appeal to. . . .*" (Emphasis added.)

In *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936), Justice Cardozo explained "arising under" jurisdiction at some length:

> How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books. Some tests are well established. *To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.* . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and *the controversy must be disclosed upon the face of the complaint*, unaided by the answer or by the petition for removal.

299 U.S. at 112-113 (emphasis added; citations omitted). The Court applied its reasoning to the case before it and observed:

> The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.

299 U.S. at 117.

In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), the Court reinforced the earlier decisions described above. The Court noted in particular that "*a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws.*" 339 U.S. at 672 (quoting *Tennessee v. Union & Planters' Bank*, 152 U.S. at 464) (emphasis added).

In *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974) (per curiam), the Court repeated the *Gully* rule that, to sustain federal jurisdiction, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

These decisions show that the respondents' complaint does not arise under the federal law: (1) respondents have invoked the jurisdiction of only California courts for determination of their state-law claims; (2) they do not assert a federal right in their state-court complaint; (3) there is no *necessary* federal element to their state-law claims; (4) the suggestion of petitioners that respondents will or may set up a federal claim, or indeed that they have asserted a federal claim elsewhere, is ineffective to create federal jurisdiction; and (5) federal law "lurking in the background"—lurking, indeed, over at the federal courthouse—is unavailing to extinguish state-court jurisdiction over respondents' state-law case.

B. Federated Department Stores, Inc. v. Moitie.

Petitioners base their entire justification for removal upon a footnote in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), but they have been unable to extract from that footnote any statement of general principle that the Court intended should apply in other cases. Unable to discern a rule established by *Moitie*, and unwilling to address the facts of that case (which turned upon a federal judgment and *res judicata*, not present here), petitioners simply take pot shots at the Ninth Circuit's interpretation of *Moitie*. The reason for petitioners'

inability to state what *Moitie* stands for is simply that *Moitie* stands for no jurisdictional proposition. As the Court stated in *Moitie,* "The only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of *res judicata.*" 452 U.S. at 395.

The majority did not address jurisdiction in the text of its opinion. It relegated to a footnote its observation that "at least some of the claims had a sufficient federal character to support removal." 452 U.S. at 397 n.2. The Court did not explain what claims were federal or what factors caused them to be federal. It simply referred to a factual finding of the District Corut regarding the plaintiffs' "essentially federal law claims" and concluded: "We will not question here that facutal finding." *Id.*

The Court's refusal to "question" the conclusion that the plaintiffs had pleaded "essentially federal law claims" might have been ambiguous if it were not for Justice Blackmun's concurring opinion. Justice Blackmun revealed that the respondents had not cross-petitioned from the part of the decision of the Court of Appeals that upheld removal jurisdiction. 452 U.S. at 404. Thus, the Court did not face the issue of jurisdiction of the courts below, and the statement "we will not question" was equivalent to "we need not address."[3]

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[3] The failure of the Supreme Court to address the question of jurisdiction matches the treatment of jurisdiction by the Court of Appeals in *Moitie.* As the Ninth Circuit stated, "The parties have devoted their briefs and oral arguments to the removal issue. They have not briefed the *res judicata* question, even after invitation to do so." *Moitie v. Fed-*

(Continued on following page)

This Court has never cited *Moitie* for any proposition concerning jurisdiction in over six years since that decision was rendered. The Court has repeated, however, its rule that "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1984) (quoting *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974)). This rule, this Court's treatment of jurisdiction in *Moitie*, and the Court's failure ever to rely upon the decision for jurisdictional analysis all point to one conclusion: *Moitie* simply has no precedential value on the jurisdictional issue in this case.[4]

C. Recent Decisions.

The decisions of this court after *Moitie* show that the well-pleaded complaint rule was not overruled or altered by that decision. They also demonstrate the correctness of the Ninth Circuit's result in this case.

(Continued from previous page)

erated Department Stores, Inc., 611 F.2d 1267, 1268 n.2 (9th Cir. 1980). The Court of Appeals accorded one short paragraph to the jurisdiction question; concluded it with a statement that "[i]n light of our disposition of this appeal, appellants [who challenged federal jurisdiction] will not quarrel with the result"; and devoted the remainder of the opinion to the *res judicata* issue. *See* 611 F.2d at 1268, 1269-70.

[4] In light of this conclusion, petitioners' argument that the Ninth Circuit decision "renders *Moitie* removal purposeless" is exposed as proving too much: *Moitie was purposeless with regard to removal.* It was simply—as the Court itself made clear—a *res judicata* decision

In *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983), this Court ordered remand to state court of a case brought by California state tax authorities to levy upon ERISA plan funds to collect state taxes. The Court discussed long-standing principles marking the boundaries of federal removal jurisdiction:

> The jurisdictional structure at issue in this case has remained basically unchanged for the past century. . . . For this case—as for many cases where there is no diversity of citizenship between the parties—*the propriety of removal turns on whether the case falls within the original "federal question" jurisdiction of the United States district courts* . . . .

463 U.S. at 7-8 (emphasis added). This Court highlighted the well-pleaded complaint rule as a "powerful doctrine,"

> which as a practical matter severely limits the number of cases in which state law "creates the cause of action" that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts.

463 U.S. 9-10. The Court continued:

> For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case "arises under" federal law. "[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank in Meridian,* 299 U.S. 109, 112 (1936).

Franchise Tax Board, 463 U.S. at 10-11 (emphasis in original). The Court quoted *Gully* to the effect that federal law "lurking in the background" is "unavailing to

extinguish the jurisdiction of the states." *Franchise Tax Board,* 463 U.S. at 12 (quoting *Gully,* 299 U.S. at 117).

The Court recognized that "arising under" jurisdiction could exist either (1) because federal law creates the cause of action asserted by a plaintiff or (2) because federal law unavoidably controls the case. The Court noted:

> Although we have often repeated that "the party who brings a suit is master to decide what law he will rely upon," *The Fair v. Kohler Die and Specialty Co.,* 228 U.S. 22, 25 (1913), it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint, see *Avco Corp. v. Aero Lodge No. 735, Int'l. Assn. of Machinists,* 376 F.2d 337, 339-340 (CA6 1967), aff'd, 390 U.S. 557 (1968).

Franchise Tax Board, 463 U.S. at 22. This Court then examined how strong a "necessity" was required for a state-law claim to present "necessary federal questions" under *Gully* that would support federal jurisdiction and removal of a case from state court. Regarding *Avco,* the Court stated:

> The necessary ground of decision was that the preemptive force of § 301 [of the Labor Management Relations Act of 1947, 29 U.S.C. § 185] *is so powerful as to displace entirely any state cause of action* "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the

> scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax Board, 463 U.S. at 23-24 (emphasis added; footnote omitted). The Court summarized its long line of precedent at the conclusion of its opinion by stating:

> Our concern in this case is consistent application of a system of statutes conferring original federal-court jurisdiction, as they have been interpreted by this Court over many years. Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.

463 U.S. at 27-28.

Like the improperly removed state-law action at issue in *Franchise Tax Board,* this case neither relies upon any cause of action created by federal law nor necessarily depends upon resolution of any federal law. Accordingly, the Court of Appeals for the Ninth Circuit was correct in reversing the district court's refusal to remand the case.

In *Merrell Dow Pharmaceuticals Inc. v. Thompson,* — U.S. —, 106 S.Ct. 3229 (1986), this Court analyzed the limits of federal "arising under" jurisdiction. The Court stated: "we have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." — U.S. at —, 106 S.Ct. at 3233. This Court once again discussed the "need for prudence and restraint in the jurisdictional inquiry." — U.S. at —, 106 S.Ct. at 3234 (citing *Franchise Tax Board,* 463 U.S. at 20).

Acknowledging that there was no "single, precise definition" of "federal question" jurisdiction of the federal courts, the Court discussed two categories of cases falling within that jurisdiction as identified earlier in *Franchise Tax Board*. *See supra* at 18. First, the Court observed that

> [t]he "vast majority" of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a " 'suit arises under the law that creates the cause of action.' " Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action.

Merrell Dow, — U.S. at —, 106 S.Ct. at 3232-3233 (citations omitted). The Court recognized a well-established line of Supreme Court precedent that allows a party to select the causes of action asserted in a complaint:

> Jurisdiction may not be sustained on a theory that the plaintiff has not advanced. See *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480, 35 S.Ct. 658, 659, 59 L.Ed. 1056 (1915) ("[T]he plaintiff is absolute master of what jurisdiction he will appeal to"); *The Fair v. Kohler Die and Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon").

Merrell Dow, — U.S. at —, n.6, 106 S.Ct. at 3233 n.6.

Second, this Court observed: "we have, however, also noted that a case may arise under federal law 'where the vindication of a right under state law *necessarily turned* on some construction of federal law.' " — U.S. at —, 106 S.Ct. at 3233 (quoting *Franchise Tax Board*, 463 U.S. at 9) (emphasis added). The Court quoted, with implicit ap-

proval, the explanation of the Court of Appeals in that same case concerning the "necessary" federal character of state-law claims in this second category of cases:

> Federal question jurisdiction would . . . exist only if plaintiffs' right to relief *depended necessarily* on a substantial question of federal law. . . . Because the jury could find negligence on the part of Merrell Dow without finding a violation of the [Federal Food, Drug and Cosmetic Act], the plaintiffs' causes of action did not depend necessarily upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to federal court.

Merrell Dow, — U.S. at —, 106 S.Ct. at 3232 (quoting 766 F.2d 1005, 1006 (6th Cir 1985)) (emphasis in original).

In this case, application of the rules and principles of *Merrell Dow* and the precedent of this Court relied upon in that decision requires a finding that respondents' state-court suit also was improperly removed. Respondents here chose not to advance federal-law theories in their state-court complaint. Thus this case does not fall within the first category of "arising under" jurisdiction. In addition, nothing either in the facts underlying respondents' claims or in their pleadings brings the case within the second category of "arising under" jurisdiction in which they must *necessarily* rely upon federal law. Respondents' state-law claims exist independently of, and in addition to, any federal claims they may have, whether those claims are asserted or not.

In *Metropolitan Life Insurance Co. v. Taylor*, — U.S. —, 107 S.Ct. 1542 (1987), this Court addressed the application of the well-pleaded complaint rule to a claim for disability benefits under an ERISA plan. The Court dis-

cussed the fact that federal pre-emption in a particular area may make any civil complaint "raising this select group of claims" *necessarily* federal in character. *Id.* at —, 107 S.Ct. at 1546. The Court expressed hesitation at basing jurisdiction upon a characterization that state-law claims were necessarily federal because of pre-emption. It stated: "Even with a provision . . . that lies at the heart of a statute with the unique pre-emptive force of ERISA, however, *we would be reluctant to find that extraordinary pre-emptive power,* such as has been found with respect to § 301 of the [Labor Management Relations Act, 29 U.S.C. § 185], *that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.*" *Metropolitan Life,* — U.S. at —, 107 S.Ct. at 1547 (emphasis added). Instead, the Court found that the case arose under the laws of the United States because of an explicit Congressional direction that all suits to enforce benefit rights under ERISA plans were to be regarded as arising under the laws of the United States. — U.S. at —, 107 S.Ct. at 1547-1548. Justice Brennan, joined by Justice Marshall, concurred in the opinion, writing separately to note that "the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court." *Id.* at —; 107 S.Ct. at 1548 (emphasis in original).

In its most recent case confronting these issues, *Caterpillar Inc. v. Williams,* — U.S. —, 107 S.Ct. 2425 (1987), this Court upheld the remand of a case removed from state court. The Court discussed the history of the well-pleaded complaint rule, *id.* at — and n.7, 107 S.Ct. at 2429 and n.7; and it discussed the " 'independent corollary' to the well-

pleaded complaint rule known as the 'complete pre-emption' doctrine." *Id.* at —, 107 S.Ct. at 2430 (quoting *Franchise Tax Board,* 463 U.S. at 22). Relying upon *Metropolitan Life* and *Franchise Tax Board,* the Court stated that "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar,* — U.S. at —, 107 S.Ct. at 2430.

The Court expressly stated that *the "artful pleading" doctrine cannot be invoked on the basis of facts not alleged in the complaint. Id.* at —, 107 S.Ct. at 2432. In support of that statement, the unanimous court quoted Justice Brennan's dissenting statement in *Moitie,* 452 U.S. at 410 n.6, that *recharacterization of a plaintiff's claim as federal is correctly confined to areas of the law pre-empted by federal substantive law. Caterillar,* — U.S. at —, n.11, 107 S.Ct. at 2432, n.11.

Thus, to the extent that petitioners suggest that *Moitie* might support recharacterization of a plaintiff's complaint on the basis of matters, *other than federal pre-emption of purportedly state-law claims,* not found within that complaint, that suggestion has been soundly rejected by this unanimous Court during its most recent term. There is no reason for the Court to review the Ninth Circuit's decision here upon petitioners' strained suggestion that *Moitie* requires a different result, because all the relevant decisions since *Moitie* confirm the correctness of the Ninth Circuit's result.[5]

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[5] When they argue that the Ninth Circuit construes "artful pleading" recharacterization to apply where *res judicata*

(Continued on following page)

III. THERE IS NO CONFLICT AMONG CIRCUIT COURTS REGARDING THE PROPRIETY OF REMAND OF THIS STATE-LAW CASE.

Petitioners' argument that the decision of the Ninth Circuit conflicts with decisions of the Second and Fifth Circuits collapses upon inspection of the purportedly conflicting decisions. All three Courts of Appeals found removal improper in the cases before them, and all three would have decided this case the same way. They might have differed somewhat in their approaches, but it is an axiom that this Court "reviews judgments, not statements in opinions." *California v. Rooney*, — U.S. —, 107 S.Ct. 2852, 2854 (1987); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Because the judgments of the Second, Fifth and Ninth Circuits would have been identical in this case, the present petition does not "squarely frame[ ] the issue," *cf.* Pet. at 4, but instead proposes an exercise better suited to academic gowns than to judicial robes.

(Continued from previous page)

creates a defense, petitioners unwittingly criticize the Ninth Circuit for *expanding* the artful pleading too far, by recognizing a basis of federal jurisdiction under "artful pleading" analysis other than pre-emption. The fact is that neither pre-emption nor *res judicata* applies to this case, so that, even under the expanded scope of artful pleading, respondents' state-court complaint was not removable. Moreover, petitioners' reason for asserting federal jurisdiction over the state-court case was a claim of *"lis alibi pendens"* (or "other action pending") in federal court. *That also is generally a defense. See Schwartz v. Horowitz*, 131 F.2d 506, 508-9 (2d Cir. 1942); *Hudson & Manhattan R. Co. v. United States*, 28 F. Supp. 137 (S.D.N.Y. 1939); *cf. Belcher Co. of Alabama, Inc. v. M/V Martha Mariner*, 724 F.2d 1161, 1163 (5th Cir. 1984) (*lis alibi pendens* raised as defense). Thus, by petitioners' own argument, their theory of jurisdiction fails.

Indeed, the petition remarkably fails to address the particular facts of this case anywhere in its argument. It simply engages in a theoretical and abstract dissertation which, untested by reference to any particulars of this case, is wholly unilluminating.

The Second Circuit, in *Travelers Indemnity Co. v. Sarkisian,* 794 F.2d 754 (2d Cir.), *cert. denied,* — U.S. —, 107 S.Ct. 277 (1986), looked to the *sequence* of complaints in federal and state courts as a necessary criterion in determining whether federal law claims were artfully pled. Discussing the facts presented in *Moitie,* the Second Circuit concluded that "Brown [the plantiff] had an initial opportunity to be master of his price-fixing claim and elected to assert it under the Clayton Act in federal court. Having done so and having foregone the opportunity to plead a pendent state law claim, he was not free to abuse the dual court system by *filing in state court a second lawsuit* and *resubmitting his claim* as one based solely on state law." 794 F.2d at 760-761 (emphasis added). The Second Circuit held that the state-court complaint there met the "sequence" element of artful pleading "since [Travelers' state-court] complaint was filed after Travelers had previously elected to bring a similar claim in federal court under RICO." 794 F.2d at 761.[6]

Application of the "sequence" analysis of *Travelers* to the present case would require remand to state court. Respondents (as well as petitioner FAS) filed *in state*

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[6] The Second Circuit found that, although the "sequence" element was met, the other artful pleading element—identity of the elements of the state and federal claims—was not met. As a consequence, the court ordered the state-law case remanded.

court first. That fact alone would cause the Second Circuit to reach the same result in this case as was reached by the Ninth Circuit.

Moreover, in the language quoted above, the Second Circuit emphasized that plaintiff had deliberately withheld a claim that it could have asserted, under principles of pendent jurisdiction, in its first (federal court) action. Here, respondents could not have filed their claims under the Securities Exchange Act of 1934 in their first (state court) complaint, because those claims are within the exclusive jurisdiction of federal courts. *See* 15 U.S.C. § 78aa.[7] They passed up no opportunity to assert those claims in state court.

The Fifth Circuit, in *Powers v. South Central United Food & Commercial Workers Unions and Employers Health & Welfare Trust,* 719 F.2d 760, 765 (5th Cir. 1983), found removal improper where, in her state-court complaint, "Powers alleged no federal cause of action, raised no federal issue, and relied on no federal statute." The court stated as "an initial proposition" that "the law that creates the cause of action [in *Powers'* complaint] is state law, and original federal jurisdiction is lacking unless Powers' claim falls victim to an exception to the well-pleaded complaint rule." 719 F.2d at 765. The court held that "[o]nly when the plaintiff's complaint clearly establishes that the claim is one necessarily arising under

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[7] Respondents also filed their state-court complaint before the California Supreme Court, in *Cianci v. Superior Court,* 40 Cal.3d 903, 221 Cal.Rptr. 575 (1985), held that RICO claims may be asserted in state courts. The question whether state courts have concurrent jurisdiction over RICO actions is still unsettled in federal courts.

federal law will the federal issue suffice to support removal to federal court." *Id.* at 766. Because the state-court complaint by the present respondents alleges no federal cause of action, raises no federal issue, relies on no federal statute, and states no claim that necessarily arises under federal law, the analysis of the Fifth Circuit in *Powers*, like that of the Second Circuit in *Travelers* and that of the Ninth Circuit here, would require remand of this case to state court.[8]

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[8] Petitioners raise a red herring when they attribute to the Fifth Circuit an "election," or motivation, criterion for artful pleading based on its statement (719 F.2d at 766) that "Powers has not evidenced a desire to proceed under federal law; rather, she has consistently and vociferously attempted to avail herself of the state forum and relief to which she asserts entitlement." First, the statement evidently concerns Powers' state-court *complaint*, which was carefully limited to state law; the Fifth Circuit acknowledged that Powers had also filed a parallel federal action. 719 F.2d at 766 n.5.

Second, the Fifth Circuit explained the crucial differences between *Moitie* and Powers' action. In *Moitie*, the plaintiffs attempted to evade a valid federal court *judgment* that should have barred their second suit. In *Powers*, there had been no judgment in any court. As the Fifth Circuit explained, moreover, "that her federal suit evidently alleges violations of ERISA based on the same set of circumstances involved in the instant case does not bring her within *Moitie*, however, because her federal suit is merely a *tactical maneuver, instituted after her state court filing, to protect herself*. This is clearly and substantially different from the situation presented in *Moitie*." 719 F.2d at 766 n.5. This explanation shows that respondents also fall outside the scope of *Moitie*: respondents' federal action was likewise instituted *after their state-court filing* and was likewise filed for tactical and protective purposes, namely to safeguard against potential difficulties establishing personal jurisdiction over some defendants in Californa state court and to enjoy economy and efficiency of discovery procedures by riding the coattails of related consolidated federal class actions.

(Continued on following page)

CONCLUSION

Because the Ninth Circuit's decision ordering remand of this purely state-law case to state court rests firmly upon the constitutional design of a dual court system with overlapping jurisdictions, because the decision is consistent with a century of this Court's "arising under" analysis, and because the decision would have been no different in any other Court of Appeals, this Court should deny the petition for writ of certiorari.

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Third, the discussion of plaintiff's intentions in *Powers* was merely *dictum* because the holding of the decision was that "a defense of federal preemption of state law claims does not suffice to bring a case within the original [and, therefore, removal] jurisdiction of the federal courts." 719 F.2d at 767. Thus, under any analysis of the holding and the reasoning of *Powers* (as opposed to a textual snippet taken out of context), it is clear that the Fifth Circuit would not differ from the Ninth Circuit in deciding to order remand of the respondents' state-court action.

Supreme Court, U.S.
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No. 87-102

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

FIRST AFFILIATED SECURITIES, INC.,
a California corporation, et al.,
Petitioners,

vs.

MARY LOU SULLIVAN, et al.,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 87-102

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I. INTRODUCTION

Respondents ("plaintiffs"), acknowledging the constitutional significance of this case,[1] nevertheless seek to obfuscate the issues with irrelevant matters and misconstruction both of *Federated Department Stores v. Moitie* and of the decisions of the second and fifth circuit courts. The opposition to the petition discussed chiefly various general principles governing parallel actions, the balance between the state and federal judicial systems, and federal preemption. None of these matters, important though they may be, is at issue in this case. The sole issue is whether there is removal jurisdiction predicated on the "election" rationale for non-preemption artful pleading under *Moitie* and its progeny.

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[1] Brief in Opposition to Petition for Writ of Certiorari at 5-6.

II. THERE IS A CONFLICT IN THE CIRCUITS WHICH WOULD AFFECT THE RESULT REACHED IN THIS CASE

Plaintiffs attempt to manipulate this case into consistency with *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.), *cert. denied*, __ U.S. __, 107 S.Ct. 277 (1986) and *Powers v. South Central United Food & Commercial Workers Unions*, 719 F.2d 760 (5th Cir. 1983). As the Ninth Circuit itself recognized, no such reconciliation is possible. There is a clear split in the federal circuit courts which this Court should resolve.

A. The Same Result Would Not Have Obtained Under *Travelers Indemnity Co. v. Sarkisian*

Plaintiffs contend that there is no split in the circuits because this case would have been remanded under the ruling in *Travelers Indemnity Co. v. Sarkisian*. Plaintiffs contend *Travelers* relied upon a "sequence" and not an "election" rationale.[2] The crux of plaintiffs' argument is that they can defeat removal under the *Moitie* artful pleading doctrine by the simple expedient of having filed their state court action some days prior to the filing of their federal action. In so doing, plaintiffs misconstrue the Second Circuit's decision. This "artful filing" exception to the "artful pleading" doctrine is not supported by the *Travelers* decision and was rejected by both the Court of Appeals and the District Court in this case.

The *Travelers* criteria require that at least one of the claims asserted in the federal action be substantially identical to one of plaintiffs' state court claims, and that the plaintiffs must have "previously elected to proceed in federal court." *Travelers*, 794 F.2d at 760. The meaning of the "previously elected" requirement is not explained in *Travelers*. That decision, however, neither states nor suggests that that requirement means that the federal complaint must be filed before the state action is commenced. The crucial time in a determination of removability is not when the action is filed but the time of removal. *E.g., In re Carter*, 618 F.2d 1093 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981)

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[2] Brief in Opposition to Petition for Writ of Certiorari at 25.

(citing *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939)). *See* 28 U.S.C. § 1446(b) para. 2. Thus the only reasonable interpretation of the *Travelers* "previously elected" language is that the plaintiffs' election to proceed in federal court must occur prior to removal.

The District Court in this case found that the election requirement was satisfied where plaintiffs filed their federal action shortly after the filing of this action and prior to its removal.[3] The Court of Appeals, too, rejected plaintiffs' "sequence" argument, stating:

> [T]he order of filing should make no difference. Regardless of the filing order, the plaintiff will have elected to use the federal forum and to split his claims.[4]

Thus, had the Ninth Circuit Court of Appeals applied to this case the test propounded by the Second Circuit in *Travelers*, the result would have been different—the Court of Appeals would have affirmed the District Court's denial of the motion to remand.

B. Plaintiffs Have Not Brought Themselves Within The Decision in *Powers v. South Central United Food & Commercial Workers Unions*

Plaintiffs' attempt to establish that the result would have been the same had the Court of Appeals in this case applied the reasoning in *Powers v. South Central United Food & Commercial Workers Unions*, must also fail. Plaintiffs' claim rests on the premise that they occupy the same position as the plaintiff in *Powers* because they, too, filed their federal action for defensive and tactical reasons and "ha[d] not evidenced a desire to proceed under federal law." *Powers*, 719 F.2d at 766. This premise is flatly contradicted by the factual findings of the District Court, which findings were not disturbed by the Court of Appeals.[5] The District Court explicitly found: "[P]laintiffs have evidenced their inten-

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[3] Appendix II at A-20-A-21.

[4] Appendix I at A-14.

[5] The Court of Appeals held that plaintiffs' motive in filing the federal action was irrelevant. Appendix I at A-14.

tion to utilize affirmatively the processes of the federal courts to redress the identical claimed injury alleged in their State Action."[6] The District Court also found that "plaintiffs have acknowledged their desire affirmatively to invoke the jurisdiction of the federal courts and to utilize its processes."[7] Those factual findings have never been questioned.

III. *FEDERATED DEPARTMENT STORES v. MOITIE* CREATED AN EXCEPTION TO THE WELL-PLEADED COMPLAINT RULE WHICH HAS BEEN FOLLOWED BY THE FEDERAL COURTS

Plaintiffs argue that this Court's decision in *Moitie* was limited to the issue of res judicata and created no basis for applying the artful pleading doctrine unless preemption exists. Plaintiffs state, in short, that "*Moitie* stands for no jurisdictional proposition."[8] This argument is nothing but wishful thinking on plaintiffs' part. As the District Court for the Southern District of New York, in analyzing *Moitie*, recently explained:

> *Res judicata* was the main issue before the Supreme Court. But the Court's jurisdiction depended on the propriety of the removal of Brown's state law complaint. In an important footnote, the Court approved the removal determination.

Bowlus v. Alexander & Alexander Serv. Inc., 659 F. Supp. 914, 920 (S.D.N.Y. 1987). Plainly, absent a determination by the Court that it had jurisdiction based upon artful pleading removal, the Court could not have reached res judicata issue in *Moitie*. Thus, the footnote in which the Court dealt with that removal by no means incidental, as Justice Brennan, in his dissent in *Moitie*, recognized.

Although *Moitie* did not overturn the well-pleaded complaint doctrine, it did recognize an "artful pleading" exception to it.

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[6] Appendix II at A-20.

[7] Id. at A-21.

[8] Brief in Opposition to Petition for Writ of Certiorari at 15.

> We agree that at least some of the claims had a sufficient federal character to support removal . . . . [C]ourts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two *Brown* complaints, it found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state-law claims.[9]

This Court stated that the district court's finding on the removal issue was a factual one.[10]

Plaintiffs' reliance on decisions of this Court in support of their assertion that they are entitled to the protections of the well-pleaded complaint doctrine in this case is misplaced. Plaintiffs have not brought themselves within the purview of the doctrine. They could have done so by ignoring their federal claims and bringing their claims under only state law in state court. They did not. Instead of ignoring their federal claims, plaintiffs asserted rights to relief under federal law in federal court. Their attempt to defeat defendants' right to removal by splitting their claims between two complaints is purely a strategem to close off defendants' right to a federal forum. It is nothing but artful pleading in the purest sense, and *Moitie* makes it clear that, under the facts presented in this case, it should not be allowed to succeed.

Bowlus is not alone in regarding *Moitie's* removal determination as significant. If "*Moitie* stands for no jurisdictional proposition," as respondents contend, there are several other federal

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[9] 452 U.S. 394, 397 n.2 (citing 14 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3722, pp. 564-566 (1976)).

[10] *Id.* The Court of Appeals in this case applied a *de novo* standard of review, relying on the dissent of Justice Brennan in *Moitie*, rather than on the decision of the majority of this Court in that case.

courts that are unaware of that fact. *See Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754; *Powers v. South Central Food & Commercial Workers Unions*, 719 F.2d 760 (5th Cir. 1983); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984), *aff'g in relevant part*, 525 F. Supp. 566 (N.D. Cal. 1981); *Reid v. Walsh*, 620 F. Supp. 930 (M.D. La. 1985); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566 (N.D. Cal. 1981), aff'd in relevant part, 731 F.2d 1423 (9th Cir. 1984). Even the Court of Appeals in this case, although disagreeing with the decision of other federal courts about the parameters *Moitie* removal, nonetheless plainly recognized that there is a non-preemption branch of the artful pleading doctrine as articulated in *Moitie*.[11]

IV. PLAINTIFFS DO NOT HAVE AN ABSOLUTE RIGHT TO PURSUE PARALLEL ACTIONS, THEREBY BURDENING BOTH THE STATE AND FEDERAL JUDICIAL SYSTEMS

Plaintiffs' argument about the benefits of parallel state and federal proceedings, while of interest, is irrelevant to the issue in this case. Defendants do not contest plaintiffs' right to *file* parallel lawsuits, or even to maintain parallel lawsuits if defendants do not object. Defendants do contest plaintiffs' artful attempt to prevent defendants from removing the state action to federal court if they disagree that the pursuit of parallel litigation would be beneficial and choose to assert their statutory right to remove.

Plaintiffs cite several decisions of this Court in support of their contention that they have an absolute right to pursue their parallel state and federal actions. None of those cases supports that proposition. None of the cases even addresses removal issues.[12]

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[11] Significantly, plaintiffs nowhere defend the decision of the Court of Appeals—only the result reached.

[12] In *Pennzoil Co. v. Texaco, Inc.*, ___ U.S. ___, 107 S.Ct. 1519 (1987), and *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), the plaintiffs in the state actions were defendants in the federal actions. Therefore there was no election by the state court plaintiffs to utilize the processes of the federal courts. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), abstension cases, involved parallel

(Footnote continued on following page)

Defendants' position is not the all-out attack on parallel litigation that plaintiffs imply. It is not defendants' contention that there is never a right to pursue parallel litigation. The district court, on removal of the parallel state action, is free to decline to exercise pendent jurisdiction over the state law claims and could remand those claims. Here, however, the same plaintiffs filed parallel federal and state actions alleging substantially identical claims against the same defendants, based upon the identical facts, pleaded virtually identically through over sixty pages of their complaints. Defendants' contention is simply that, in such a situation, plaintiffs cannot prevent defendants from removing the state action and asking the federal court to determine whether it will exercise jurisdiction over the state claims, so that the case can be decided in a single proceeding in a single court. This decision should be the district court's and not plaintiffs'.

The "election" approach to the artful pleading doctrine does not do violence to the dual state and federal judicial systems. What does do violence to those systems is plaintiffs' claimed absolute right to maintain duplicative litigation, burdening two courts with the same case.

The course of proceeding employed by plaintiffs in this case constitutes a clear misuse of judicial resources. The prejudice to defendants in defending two actions, one of which must be dismissed before trial,[13] is obvious. The prejudice to plaintiffs of

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actions only to the extent that the plaintiffs were directed by the federal courts to bring state court actions to allow the state courts to determine important questions of state law. In *Princess Lida v. Thompson*, 305 U.S. 456 (1939), the state and federal actions involved different parties and substantially different claims. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) and *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), were cases under the Anti-Injunction Act, 28 U.S.C. § 2283, in which the state court defendants never removed the actions to federal court.

[13] *See* Brief in Opposition to Petition for Writ of Certiorari at 5; *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."); *Los Angeles Branch NAACP v. Los Angeles United School*

(Footnote continued on following page)

being required to pursue their action in a single forum, in which judgment may be rendered on all of plaintiffs' claims, is not.

V. CONCLUSION

The petition for writ of certiorari should be granted.

DATED: August 27, 1987

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Dist., 750 F.2d 731, 739 (9th Cir. 1984), *cert denied*, ___ U.S. ___, 106 S.Ct. 247 (1985) (Res judicata bars a party from maintaining "a subsequent action *on any part* of the original cause of action, even if that part was not litigated in the prior action." (emphasis in original)).

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